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In the Supreme Court of the United States

October Term, 1991

LATIAN, INC. and AMANOLLAH SARBAZ,
Petitioners,

v.

BANCO DO BRASIL, S.A. and JOAO STEFANON,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW*

1. Does a state appellate court have the power to reverse findings of fact by a jury and overturn the jury's verdict of liability and damages against a bank, solely on the basis of the appellate court's own views of how banks do business, or does such action violate the plaintiff's right to a jury trial under the Seventh Amendment to the United States Constitution?

2. Did the state appellate court's reliance on its ex cathedra opinions of how banks do business to reverse a jury verdict to the contrary deprive petitioners of the ability to confront and cross-examine opposing witnesses, and thereby violate the Seventh Amendment to the United States Constitution?

3. Were the state appellate procedures followed in this case inconsistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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* If Certiorari is granted to review the questions presented above, certain other questions are presented for review, including the following:

1. Did the appellate court errantly apply the parol evidence rule in disregarding the trial court's finding of fact that a written agreement was not integrated, when the trial court's finding was supported by substantial evidence?

2. Did the court of appeal commit error in applying the parol evidence rule to an oral condition precedent to the efficacy of a written promise to pay, unconditional in form, by finding that oral condition inconsistent with the written promise?

3. Did the trial court remittitur of punitive damages from $22 million to $5 million violate petitioners' constitutional rights?

PARTIES TO THE PROCEEDINGS BELOW AND LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

The parties to the proceedings below were as follows: Banco Do Brasil, S.A., Los Angeles Agency, a banking organization organized and existing under the laws of Brazil, was plaintiff and cross-defendant in the trial court. Joao Stefanon, an individual, was also a cross-defendant. Latian, Inc., a California corporation, and Amanollah Sarbaz, an individual, were defendants and cross-complainants. In the Court of Appeal for the State of California, Banco Do Brasil and Joao Stefanon were appellants; Latian, Inc. and Amanollah Sarbaz were respondents and cross-appellants.

Petitioner Latian, Inc. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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In the

Supreme Court of the United States

October Term, 1991

LATIAN, INC. and AMANOLLAH SARBAZ,

Petitioners,

v.

BANCO DO BRASIL, S.A. and JOAO STEFANON,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners Latian, Inc. and Amanollah Sarbaz respectfully pray this Court to issue a Writ of Certiorari to review the opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, entered in the above-entitled proceeding on September 27, 1991, and of which the Supreme Court of the State of California denied review without opinion on January 23, 1992.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, was issued on September 27, 1991, and is reported as Banco Do Brasil v. Latian, Inc., 234 Cal. App. 3d 973, 285 Cal. Rptr. 870 (1991). A copy of the Order is attached hereto as Appendix ("App.") A-1 to A-53. The Order of the Court of Appeal for the State of California, Second Appellate District, Division Three, denying the Petition for Rehearing of Latian, Inc. and Amanollah Sarbaz was issued on October 25, 1991, and is unreported. A copy of that Order is attached hereto as App. A-54. The Order of the Supreme Court of the State of California denying the Petition for Review of Latian, Inc. and Amanollah Sarbaz was issued on January 23, 1992, and is unreported. A copy of the Order of the Supreme Court of the State of California is attached hereto as App. A-55.

JURISDICTION

Latian, Inc. and Amanollah Sarbaz have filed this Petition to review the final judgment of the state courts of California. The Court of Appeal of the State of California reversed the judgment of the trial court and remanded the case to the trial court with directions to enter judgment in favor of Banco Do Brasil and Joao Stefanon. Latian, Inc. and Amanollah Sarbaz brought a timely Petition for Rehearing in the Court of Appeal of the State of California. That petition was denied without opinion. The highest court of the State of California, its Supreme Court, on January 23, 1992 also denied without opinion the Petition for Review brought by Latian, Inc. and Amanollah Sarbaz. In this Court, petitioners Latian, Inc. and Amanollah Sarbaz have timely filed this Petition for Writ of Certiorari, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the United States Constitution are involved in this case:

> Seventh Amendment, United States Constitution:
>
> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court in the United States than according to the rules of the common law.
>
> Fourteenth Amendment, United States Constitution:
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners Latian, Inc. ("Latian") and Amanollah Sarbaz ("Sarbaz") brought fraud and breach of contract cross-claims against respondents Banco Do Brasil ("Banco") and Joao Stefanon ("Stefanon"). Trial commenced in this action on June 12, 1989, before a jury in California Superior Court. On July 12, 1989, the jury rendered a verdict, awarding Latian and Sarbaz $1.9 million in damages for fraud, $3.6 million for breach of contract, $22 million in punitive damages against Banco, and $500,000 in punitive damages against Stefanon. The total verdict on petitioner's cross-claim was $28 million. Judgment was entered on the verdict on July 12, 1989. On post-trial motions, the trial court remitted the punitive damages against Banco to $5 million and against Stefanon to $5, but the fraud and breach of contract damages were upheld. Thus, the judgment of the trial court remained approximately $10.5 million in favor of petitioners. In addition, Latian and Sarbaz were awarded over $600,000 in attorneys fees. On appeal, the California Court of Appeal reversed the judgment in its entirety and remanded with instructions to enter judgment in favor of Banco in excess of $2 million, including interest. The decision of the Court of Appeal has thus resulted in a loss to petitioners of approximately $15 million -- from a judgment in their favor and against Banco for approximately $11 million to a judgment against them and in Banco's favor for $2 million with Banco seeking to tack on approximately $2 million in attorneys fees.[1] Latian and Sarbaz's petitions for rehearing and review in the state appellate courts of California were both denied without opinion.

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[1] Banco and Stafanon have filed a request in the Superior Court to have attorneys fees and costs of $1.9 million added to the judgment.

How the Federal Issue was Raised

The federal constitutional issues in this case first arose when the California Court of Appeal inserted its own opinion as to how banks do business into the record, which was contrary to the jury's findings of fact, and then rendered its decision reversing the jury's verdict. It was that decision that deprived Latian and Sarbaz of their rights to a trial by jury under the Seventh Amendment of the United States Constitution. It was that decision that deprived Latian and Sarbaz of their rights to due process of law under the Fourteenth Amendment of the United States Constitution. Latian and Sarbaz immediately brought these issues to the attention of the California Court of Appeal by way of their Petition for Rehearing.

In the Petition for Rehearing, Latian and Sarbaz argued that the decision of the Court of Appeal "showed unprecedented disrespect for the Seventh Amendment of the United States Constitution, the jury system, . . . and the rights of litigants." Memorandum in Support of Petition for Rehearing at 32. Throughout their Petition for Rehearing, Latian and Sarbaz argued that the Court of Appeal has usurped the role of the jury and thus deprived Latian and Sarbaz of their constitutional rights. The California Court of Appeal denied the Petition for Rehearing without issuing an opinion.

In the California Supreme Court, Latian and Sarbaz again argued that the decision of the Court of Appeal was an improper "trial by appellate court," in that the Court of Appeal had substituted itself in place of the jury and trial court as a fact-finder. Latian and Sarbaz argued that the Court of Appeal had denied Latian due process of law, the fundamental right of cross-examination of witnesses, and the right to trial by jury. Reply in Support of Petition at 2-3. The California Supreme Court denied the Petition for Review, also without issuing any opinion. The state courts thus rejected, without any explanation, the constitutional

claims of Latian and Sarbaz.

Background and Facts

The Parties. Latian is a California corporation formed by Amanollah Sarbaz in 1982 for the purpose of acquiring and operating the auto parts supply business formerly run by what was known as the Kudsy Companies. Mr. Sarbaz was a successful businessman in Iran prior to the revolution that brought the Ayatollah Khomeini to power.

Banco is a Brazilian banking corporation owned 51 percent by the Government of Brazil. RT 1109.[2] During the events in question in this lawsuit in 1982-83, Stefanon was the managing director of Banco's Los Angeles office. As managing director, Stefanon held the number one position in the Los Angeles agency, having responsibility for the overall transactions of the agency. RT 1107.

The Result Below. This case involves claims of fraud and breach of contract by Latian and Sarbaz against Banco and Stefanon, arising out of a transaction whereby Latian agreed to purchase the assets, and assume certain liabilities to Banco, of the Kudsy Companies -- a customer of Banco in financial distress. Latian alleged, and the jury found, that Banco fraudulently induced Latian to proceed with this transaction by falsely promising to provide Latian with a $2 million line of credit previously given to the Kudsy Companies. The jury found the promise to constitute fraud, and the failure to provide the line of credit

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[2] Citations are to the reporter's transcript ("RT") and the clerk's transcript ("CT") of the trial proceedings, and to the parties' exhibits ("PX" and "DX").

to be a breach of contract.[3] The trial court, in denying Banco's post-trial motions, concurred, with extensive specific findings:

> **The court finds this is a situation in which Stefanon had a strategy to defraud the Sarbaz family as early as 1982** and fully informed his superior of the strategy; **the course of conduct of the bank was a deliberate attempt to take advantage of the Sarbaz family;** the bank made its representations to Latian repeatedly on every occasion Latian signed a document. After Latian delivered his check for $310,000 to be held in trust until line of credit was approved, the bank broke its promise by appropriating the $310,000; the bank knew of the culpability throughout the events, as evidenced by Stafanon's contract written reports, and [that] the top officials, aside from Stefanon, tried to cover up.

CT 5360-5363 (emphasis supplied).

The Court of Appeal reversed the judgment below. In rejecting the claim that Banco had made an oral promise of a $2 million line of credit, the Court of Appeal, without citation to the record or to any authority whatsoever, inserted its opinion that "Banks simply do not do business that way" and, in substance and effect, reversed the jury's finding of fact to the contrary.[4] App. A-49. The Court of

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[3] A synopsis of the evidence at trail is attached hereto as App.A-56 to A-59.

[4] The Court of Appeal also made an alternative ruling based on the parol evidence rule. The appellate court found that a Guaranty Payment Agreement executed by the parties in January of 1983 was a fully integrated document, so that any evidence of an oral agreement

Appeal's "finding of fact" as to how banks do business was contrary to the findings of the jury and contrary to the rulings of the trial court.[5]

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inconsistent with the Guaranty Payment Agreement could not be considered. In so finding, the Court of Appeal disregarded entirely the trial court's holdings to the contrary, that the Agreement was not integrated; this alternative holding under the parol evidence rule was also throughly infected with the appellate court's unconstitutional insertion of its own opinion into the record to reverse the jury's findings with respect to how banks do business since the appellate court's holding with respect to the integration issue was premised on its inserted finding, contrary to the jury's, that banks don't make oral promises for a line of credit.

[5] Two separate trial court judges passed on these issues. The trial judge, the Honorable Billy G. Mills, presided over pre-trial motions and through the close of evidence. At that point, he suffered an illness and was unable to hear post-trial motions. Judge Richard A. Lavine heard those motions, and denied Banco's request for relief, with the exception of the motion directed at the issue of punitive damages, which Judge Lavine remitted in part.

REASONS FOR GRANTING THE WRIT

This petition presents important, recurring issues involving both the Seventh and Fourteenth Amendments to the United States Constitution. The decision of the Court of Appeal for the State of California denied petitioners' right to trial by jury and to due process of law. The devastating result of the errant and unconstitutional decision below was a gross miscarriage of justice for the parties to this case, and, even more importantly, the result erodes the constitutional guarantees enjoyed by the American people and jeopardizes respect for our judicial system.

I.

This Case Raises a Fundamental Constitutional Issue Regarding the Reversal of Facts Found by a Jury Based on Appellate Court Judges' Own Views of the World.

The right to a jury trial in civil cases is unquestionably an important constitutional right. The Seventh Amendment provides (emphasis added):

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and **no fact tried by a jury shall be otherwise re-examined in any court in the United States than according to the rules of the common law**.

This constitutional protection remains as important today as it was at the time it was included in the Bill of Rights.[6]

Until approximately 1968, this Court vigorously enforced the second clause of the Seventh Amendment in scores of decisions, in which the Court reversed appellate decisions that had overturned civil jury verdicts. Eric Schnapper, Judges Against Juries -- Appellate Review of Federal Civil Jury Verdicts, 1989 Wis. L. Rev. 237, 237-46 (1989). In recent years, while appellate reversal of jury verdicts has become a frequently recurring phenomenon, this Court has not issued a ruling upholding Seventh Amendment rights. Id. at 245.

This case squarely presents the Seventh Amendment issue. The jury awarded a verdict of $28 million on findings of liability for fraud and breach of contract. The trial court upheld the liability award, but reduced the damages award to less than $11 million. The appellate court reversed the judgment in its entirety. The appellate court's decision was based entirely on its disagreement with the factual findings of the jury and of the trial court. The Court of Appeal substituted its own view for the facts found by the jury. The Court of Appeal's view was that "Banks simply do not do business that way." Petitioner submits that this Court will seldom, if ever, see a more flagrant example of what the framers of our Constitution and the Bill of Rights feared. If the Seventh Amendment limitations on the re-examination of facts tried by a jury retain any force today, this is the case for this Court to say so.

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[6] See Parsons v. Bedford, 28 U.S.(3 Pet.)433(1830). The second clause of the Seventh Amendment, that "no fact tried by jury shall be otherwise re-examined in any court in the United States than according to the rules of the common law," has been described as the "more-important" portion of the amendment. Id. at 447.

That this case comes up through a state court system in no way reduces the importance of the issues raised under the United States Constitution. A state court cannot give fewer rights than are provided under the United States Constitution. Testa v. Katt, 330 U.S. 386 (1947). The practice of appellate judges imposing their views as a substitute for the evidence and the jury's verdict cannot go on unrestrained. In the federal appellate courts, however, the practice has increased. Schnapper, supra, at 246-59. In both the state and federal courts, the trend toward trial by appellate court at some point must be reconciled with the Seventh Amendment.

Decisions like the one below, if left standing, seriously jeopardize respect for our judiciary. Cf. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944) (reversing decision to protect "integrity of the judicial process"). In a judicial system that depends upon both public confidence (as parties) and public participation (as jurors), erosion of the Seventh Amendment is a serious concern. For a party, what good is a right to trial by jury, if it provides only relief subject to arbitrary and capricious review? For a juror, what service has been rendered if one's decision carries no weight? And, for a judiciary, what justice is done when the work of jurors and trial judges is subjugated to the unrestrained will of appellate courts?

II.

This Case also Raises Other Issues Regarding the Constitutional Right to a Jury Trial.

The Court of Appeal made an ex cathedra pronouncement of how banks do business. In essence, the appellate court either took judicial notice of something not otherwise in the trial record (and in fact contrary to the evidence and the jury's findings), or the appellate court

offered, admitted, weighed, and followed its own opinion -- expert or otherwise. Either way, what the court did was insert testimony into the case at a time too late for Latian and Sarbaz to test it or to offer rebuttal.

"The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment. . . ." Adickes v. Kress & Co., 398 U.S. 144, 176 (1970) (Black, J., concurring); see also Gilmer v. Higley, 110 U.S. 47, 50 (1884) (ability of party to "tell his own tale" without cross-examination "would be a gross perversion of justice"). This important right is also implicated by the proceedings below because it was denied to petitioners with no court even issuing an opinion to explain how these rights came to be lost. To protect the right to a jury trial under the first clause of the Seventh Amendment, the petition must be granted.

III.

The Procedures Followed Below to Overturn the Verdict as to Liability, Actual Damages, and Punitive Damages, Conflict with the Decisions of this Court Under the Due Process Clause of the Fourteenth Amendment.

This case presents the "flip side" of the long line of decisions in which this Court has reviewed punitive damages awards under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In the most recent of those cases, Pacific Mut. Life Ins. Co. v. Haslip, ___ U.S. ___, 113 L. Ed. 2d 1 (1991), this Court wrote at great length on the history and application of the Due Process Clause -- as it is applied to state procedures -- and upheld an Alabama award. In the case now on petition, Latian and Sarbaz ask the Court to determine when the jury's award of damages and punitive damages

must be upheld in accordance with due process.

In Haslip, the many forceful arguments against punitive damages were presented to the Court by the defendant and several amici. The parties making those arguments would severely restrict the jury's ability to impose punitive damages. This Court rejected those requests. Instead, this Court followed the time-honored, common-law practice of leaving such awards to the jury.[7] In doing so, this Court wrote:

> One must concede that unlimited jury discretion -- or unlimited judicial discretion for that matter -- in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.

Id. at 20 (emphasis added). Haslip makes clear that due process indeed does act as a check on undue jury discretion, as the Court reiterated its "concern about punitive damages that 'run wild'." Id. But also, following the rationale of Haslip, unlimited judicial action that "runs wild" in the opposite direction is just as unconstitutional under the Due Process Clause.

Due process requires "fundamental justice," or "fairness." Snyder v. Massachusetts, 291 U.S. 97, 108, 116 (1934) (Cardozo, J.); see also Hurtado v. California, 110 U.S. 516, 535 (1884) (due process requires reference to "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions").

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[7] Justice Scalia, concurring in the judgment, would "categorically affirm" the validity of jury-assessed punitive damages. 113 L. Ed. 2d at 34.

Justice Scalia, in his concurring opinion in Haslip, recognized that

> what is important enough to have been included within the Bill of Rights has good claim to being an element of "fundamental fairness," whatever history might say; and as a practical matter, the invalidation of traditional state practices achievable through the Bill of Rights is at least limited to enumerated subjects.

113 L. Ed. 2d at 31. Obviously, the right to trial by jury in civil cases was "important enough" to be included in the Bill of Rights. Thus, any state procedure that unduly impinges on that right would violate the Due Process Clause.

Latian and Sarbaz have been denied a fundamental right by the state appellate courts in California. To be sure, not every reversal of a jury verdict would constitute a violation of the Due Process Clause or, for that matter, the Seventh Amendment. But where that reversal is based solely upon what a court may "think" (rather than the evidence of record on appeal) about how "banks" (rather than the bank involved in the case at bar) "do business" (rather than how Banco acted), then the state procedure is unconstitutional. That is precisely what the Court of Appeal of the State of California did. App. A-49. Without even issuing an opinion on the matter, the appellate court denied rehearing and the Supreme Court of California similarly, silently, refused to grant further review, a procedure which could have allowed the state court system to correct itself. Thus, the procedure in this case was fundamentally flawed, denied Latian and Sarbaz fairness, and ultimately deprived them of their rights and property without due process of law.

Much has been said and written about when the grant of a large damage award (including punitive damages) may deprive the defendant of due process. An equally important issue is when the taking away of a large damage award (including punitive damages) deprives the plaintiff of due process. This case presents the latter issue in pure form. This Court should grant the petition in order to resolve this important issue of federal constitutional law.

CONCLUSION

For each of the reasons stated above, petitioners Latian, Inc. and Amanollah Sarbaz respectfully pray that this Court grant their petition to review the decision of the Court of Appeal of the State of California.

Dated: April 20, 1992

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BANCO DO BRASIL, S.A., etc., et al., *Plaintiffs, Cross-Defendants and Appellants,* v. LATIAN, INC., etc., et al., *Defendants, Cross-Complainants and Respondents.*	)	**B045477 (Super.Ct.No. C532005)**

APPEAL from a judgment of the Superior Court of Los Angeles County. Billy G. Mills, Trial Judge. Richard A. Lavine, Post-trial Judge. Reversed and remanded with directions.

Wang and Wang, Francis S. L. Wang, and Michael T. Welch for Plaintiffs, Cross-Defendants and Appellants.

Gray, Plant, Mooty, Mooty & Bennett, Daniel R. Shulman Penny M. Tibke, Alioto & Alioto and Joseph M. Alioto for Defendants, Cross-Complainants and Respondents.

The plaintiff, cross-defendant and appellant Banco Do Brasil, S.A., Los Angeles Agency, a banking association organized and existing under the laws of Brazil ("Banco") and cross-defendant and appellant Joao Stefanon ("Stefanon") appeal from a judgment entered against them following a jury verdict in favor of the defendants, cross-complainants and respondents Latian, Inc., a California corporation ("Latian") and Amanollah Sarbaz

("Amanollah").

This appeal arises from a lender liability claim asserted by Latian and Amanollah by way of a cross-complaint to Banco's original action which it brought to enforce and recover on certain promissory notes and a written loan restructure agreement. Banco's claims were rejected by the jury in a verdict which awarded to Latian and Amanollah over $27 million dollars on their cross-complaint.

Latian and Amanollah received a judgment for substantial compensatory and punitive damages for breach of contract and fraud arising from their claim that Banco had orally promised to extend to them a "$2 million line of credit" as an integral part of a transaction in which they purchased the assets of a business by assuming certain secured debts of their seller to Banco. While all other aspects of the transaction were fully documented, the alleged promise to extend additional credit, while assertedly critical, was never the subject of any writing and was vigorously disputed by Banco.

Banco asserts that the evidence was simply insufficient to establish either that (1) any enforceable contract to provide such a line of credit ever existed or (2) any fraudulent conduct ever took place. In addition, it argues that the documentation of this transaction was such that evidence of an oral collateral agreement should have been barred by the parol evidence rule. From our examination of the extensive record of the month long jury trial which is before us, we have concluded that Banco's arguments are well taken. The trial court erroneously overruled Banco's parol evidence objections. In addition, when the record is examined in its totality, there is simply no substantial credible evidence to support the claim that Banco had agreed to or promised a $2 million line of credit to Latian or Amanollah. We will therefore reverse the judgment.

PROCEDURAL HISTORY

Banco commenced this action against Latian, Amanollah and, with respect to the fraud claim, a number of Doe defendants[1] on January 28, 1985. On that date, it filed a complaint seeking to recover sums due and unpaid under a January 1983 Guaranty Payment Agreement ($1,072,874.51) (hereinafter the "Guaranty Agreement") and three promissory notes dated June 28, 1983 ($40,000), December 6, 1983 ($5,685.17) and December 31, 1983 ($11,927.11). Banco alleged that only two principal payments were made under the Guaranty Agreement, in February and March of 1983, and none was ever made with respect to the three promissory notes. A principal unpaid balance of $1,053,433.90, plus substantial accrued interest, was claimed on several theories: a common count for money lent, breach of promissory notes and the Guarantee Agreement and promissory fraud. There is no dispute that these amounts remain unpaid.

On February 12, 1985, the respondents filed a "Joint and Several Answer and Cross-Complaint." By this pleading, the respondents denied all liability to Banco and affirmatively alleged that they had been substantially damaged by Banco's failure to honor an *oral* commitment to provide a "$2 million line of credit" to be used in the operation of Latian's business. The defendants sought damages on several theories which were asserted against both Banco and Stefanon:[2] breach of an oral agreement, fraud, negligent misrepresentation and interference with prospective advantageous economic relationships.

Prior to trial, Banco, by a motion for summary judgment sought to bar, under the parol evidence rule, any evidence

[1] Apparently the only Doe defendant who was served in the case was Amanollah's son, Manoucher Sarbaz ("Manoucher"). Amanollah had three other sons all of whom played some part in this matter; however, they were not made parties to these proceedings. Latian, Amanollah and Manoucher who is also a cross-complainant, are sometimes collectively referred to as the "respondents."

[2] Stefanon was at all relevant times the general manager of the Los Angeles Agency of the Banco do Brasil.

of a collateral oral agreement or promise by Banco to extend a "line of credit" to Latian. After extensive argument, the trial court ruled that the collateral oral evidence would be admitted. In support of such ruling, the court took the position that the claimed promise to provide such a line of credit was a matter which was "naturally separate" from the extensively documented loan and guaranty agreements which were entered into between Banco and Latian and Amanollah; based on that conclusion, the trial court held that the Guaranty Agreement was not integrated.[3] Banco's efforts to reassert this objection first by a motion to reconsider and, just prior to trial, a motion *in limine* were similarly rejected.

The case went to trial before a jury on June 12, 1989, and concluded one month later on July 12. The jury found against Banco on its contract and fraud claims and for the defendants on their cross-complaint. The jury awarded compensatory damages of $3.6 million for breach of contract against Banco. On the fraud count, the jury awarded $1.9 million compensatory damages against Banco and Stefanon and punitive damages of $22 million against Banco and $500,000 against Stefanon.

Motions for judgment notwithstanding the verdict and a new trial were filed by Banco and Stefanon. The trial

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[3] Ultimately, this conclusion was incorporated, at respondents' request, in the instructions to the jury: "In deciding the Bank's [i.e., Banco's] claim for breach of the January 1, 1983 agreements and Latian's claims for fraud and breach of an agreement to provide a line of credit, you are instructed that I have determined that the January 1, 1983 agreements are not integrated; an agreement for a line of credit is a naturally separate agreement from the January 1, 1983 documents; and you may consider any evidence regarding alleged oral agreements between the parties."

court[4] denied the former and conditionally granted the latter. The court ruled that if the defendants would accept a remittitur of punitive damages against Banco down to $5 million and against Stefanon down to five dollars then the motion for new trial would be denied. The defendants filed a timely acceptance of these conditions. In addition, the trial court made a post judgment award of attorneys fees to Latian in the sum of $637,516.50.

Banco and Stefanon filed a timely notice of appeal. The respondents filed a cross-appeal seeking reinstatement of the original punitive damage awards.

The principal claim of Banco in this action is based upon the Guaranty Agreement and related documents executed in January of 1983. The balance of their claim rests upon three subsequently executed and admittedly unpaid promissory notes. However, to fully understand the competing claims of the parties a detailed chronological (and even tedious) review of the preceding events, which began in April of 1982, is necessary.

FACTUAL BACKGROUND[5]

The Sarbaz family, headed by Amanollah, came to the

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[4] The original trial judge, the Honorable Billy G. Mills, unfortunately suffered a disabling stroke following the conclusion of the trial but before any post trial motions could be heard. As a result, the Honorable Richard A. Lavine was assigned to hear and decide such motions. It appears that Judge Lavine, who obviously did not hear any of the original testimony, did not have a complete record of that testimony upon which to make his rulings, but only those portions thereof which the parties had periodically ordered during the trial and were able to make available to him.

[5] There is practial agreement among the parties as to a substantial portion of the factual background. There is, however, serious disagreement as to certain critical matters. Unless otherwise indicated, the facts set forth are reflected in the evidence presented or acknowledged by both sides (e.g., there were a substantial number of documents introduced in evidence which speak for themselves). Where a dispute does exist we will identify the conflicting testimony as a predicate to our discussion as to whether substantial evidence supports the express and implied findings of the jury and the judgment entered thereon.

United States from Iran following the 1979 revolution in that country. While in Iran they apparently had owned and operated a successful auto parts business. Thus, in 1982 when they sought an opportunity in that same business, a broker introduced them to the possibility of acquiring a group of auto parts sales companies collectively referred to as the "Kudsy companies" or, simply, "Kudsy."[6] The two shareholders of these companies were John Koudsi ("Koudsi") and Mariano Antoci ("Antoci").

The Sarbaz family retained counsel to represent them and, in April 1982, commenced negotiations with Koudsi and Antoci for the purpose of acquiring Kudsy or its business. All such negotiations were handled through their attorneys.[7] On May 21, 1982, the Sarbaz family caused Latian to be incorporated under the laws of California for the express purpose of acquiring the Kudsy business.

Having apparently decided not to purchase the capital stock of the Kudsy companies, but rather only their assets, Latian submitted four separate written offers to Kudsy from May 21, through July 7, 1982.[8] These offers all contained variations and differences which are not particularly relevant here. What is clear is that the Sarbaz family and Latian had decided, as a result of their own investigation of Kudsy's business, that the financial condition of the Kudsy companies was such that only the assets should be purchased. It was ultimately agreed that

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[6] There were four California corporations in the Kudsy group: J. Kudsy & Co., Inc., The Dot Radio of California, Inc., Wholesale Autoparts Supply, Inc. and Herbert Albrecht Autoparts, Inc.

[7] It is important to emphasize that the respondents, in *all* of their dealings with Banco, as well as Kudsy, were advised and assisted by their own counsel.

[8] In fact, an initial offer has been submitted, on May 18, 1982, on behalf of Sarbaz and Sons, Inc., a California corporation. Although it is not entirely clear, we assume that such corporation is an entity separate from Latian. In any event, there were four specific written offers made in Latian's name which were dated May 21, June 9, June 25 and July 7, 1982. It was this last one which was accepted by Kudsy.

the principal asset, a large inventory of auto parts, would be valued independently and paid for by the assumption by Latian of the then outstanding obligation due from Kudsy to Banco.[9] The final agreement contained extensive written provisions for the independent inspection and valuation of the auto parts inventory.

The first meeting involving Banco, or any of its agents, took place on June 14, 1982. By this time, the respondents had been negotiating with Koudsi and Antoci, the owners of Kudsy, for over a month and had submitted three firm written offers (one of which was in response to a Kudsy counter-offer) to purchase all of the assets of those companies. During those negotiations the respondents had been informed about the Kudsy relationship with Banco. That relationship, which was apparently well established, included not only Banco's security interest in all of the auto parts inventory but also a line of credit arrangement which at that time was in the approximate

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[9] The specific language as finally agreed to by the parties provided:

"Payment of the purchase price allocable to the inventory shall take the form of assumption of a certain debt of SELLER [i.e., Kudsy]. LATIAN shall assume SELLER's specifically identified long term liability to Banco de Brazil, which is currently approximately 2.0 million dollars. SELLER and its shareholders agree to remain liable on said notes due Banco de Brazil, including renewals, for one year subsequent to Closing."

The agreement provided that in the event the value of the inventory exceeded the debt due to Banco, Latian would provide Kudsy with a four-year UCC secured note for the difference. In the event that the assumed debt exceeded the inventory value, then the Kudsy companies were required to forthwith reduce the liability to the value of the inventory.

It is important to note and remember that these offers, including the three submitted to Kudsy before the respondents met anyone from Banco, all involved the purchase of the Kudsy inventory by the assumption of Kudsy's obligation to Banco up to the amount of the value of the inventory. In other words, from the outset the respondents were willing to become indebted to Banco in an amount equal to the value of assets which would be delivered to them and which they would be free to resell.

sum of $2 million,[10] of which approximately $1,860,000 had been drawn down and was then outstanding.

Present at this initial meeting were (1) Amanollah, Manoucher and Dariush Sarbaz (one of Amanollah's other sons) acting for themselves and Latian, (2) Koudsi and Antoci on behalf of Kudsy and (3) Stefanon and Messrs. Jose Boiteux and Angel Ferral on behalf of Banco.[11] Amanollah spoke only Farsi and so Manoucher had to translate for him. Manoucher testified that at this meeting his father asked Stefanon, "If and when we buy it [i.e., Kudsy], would you cooperate with us? Would you let us assume the line of credit?" According to Manoucher, Stefanon replied, "If and when you buy the business, we will cooperate with you. And there should be no problem to let you assume the line of credit. . . There are some paper works and formality you have to do with the head office, but there would be no problem and we would cooperate with you." According to Stefanon, and this does not appear to be disputed, there was no discussion at that time of a line of credit for Latian, separate and apart from that of Kudsy nor did the respondents make any application for such a separate credit extension or submit any financial information to Banco. In other words, Stefanon had no problem with Kudsy and Latian working together with Kudsy's existing line of credit which, as we have noted, was entirely drawn down except for $150,000 and would be of no practical importance without substantial paydowns to Banco.

The second meeting involving Banco and the respondents occurred on July 21, 1982, two weeks after Latian had entered into the written agreement of July 7 to

[10] The testimony indicated that Stefanon had approved earlier in 1982 a credit line for Kudsy in the sum of $2,010,000.

[11] A fews days earlier, on June 9, 1982, Koudsi and Antoci had advised Stefanon that because of Antoci's health problems, they were looking for a buyer for the business. They informed Stefanon that they believed they had located such a buyer, the Sarbaz family, whom they described as having been connected with the Mazda Company in Iran. They inquired of Stefanon about Banco's position "regarding financial assistance to a new buyer."

purchase all of the assets of Kudsy. This meeting involved Stefanon and Ferral on behalf of Banco and Amanollah and Manoucher on behalf of Latian. Also present were Latian's counsel, Robert Nagata and Henry Fields, representing Banco.

The central purpose of this meeting was to discuss Banco's participation in and consent to the sale transaction that the respondents had already concluded with Koudsi and Antoci to purchase the assets of the four Kudsy companies. In order for Latian to acquire the Kudsy assets by assuming Kudsy's obligation to Banco, Banco's approval was required. Mr. Fields, counsel for Banco, testified that he explained all of this to the respondents and that Amanollah would have to personally guarantee Latian's obligation and that Banco would retain its security position with respect to the inventory. Manoucher requested that Latian be allowed to assume the credit line and Stefanon responded that Banco's head office would have to approve any additional credit and that the respondents would have to provide adequate financial information.[12] Finally, Stefanon indicated that

[12] There is considerable discrepancy in the testimony with respect to just what was said regarding this issue. Contrast the testimony of Manoucher with that of Stefanon. *Manoucher testified* under examination by his own attorney:

"Q. What did Mr. Stefanon say, if at all – if anything at all, at that meeting with regard to the line of credit?

"A. He did say that of course he had to prepare some paper works and reports and send it to his head office and get their approval. But that is basically a formality. [P.] And my father also spoke with Mr. Stefanon –

"Q. First Mr. Stefanon said he had to get approval at the head office but he said it was a formality?

"A. Yes Sir.

"Q. All right. Now go ahead. [P.] And you said that your father then spoke privately with Mr. Stefanon?

"A. Yes, sir.

"Q. And were you translating?

"A. Yes, sir.

"Q. All right. Tell us now, as best you can, what your father said to you, which you translated to Mr. Stefanon, and what Mr. Stefanon said

Footnote 12 continued.

Footnote 12 continued.
to you, which you translated to your father?

"A. My father basically repeated the same thing, and he -- that he has lost most of his assets in Iran because of the revolution, and he has six sons and one daughter. He likes to set up a business for them. [P.] And he seeks cooperation of Mr. Stefanon, and he wants to make sure that Banco do Brasil will grant $2 million line of credit to us.

"Q. And what did Mr. Stefanon say to your father through you?

"A. Mr. Stefanon assured my father of his cooperation, and he again mentioned that he has to fill out some paper works and get the approval of the head office, but he also mentioned that these are merely a formality. Once we command [sic] the line, it would be okayed by the head office."

Stefanon, on the other hand, testified under examination by Banco's counsel:

"Q: And was there any discussion at this meeting concerning a line of credit to be granted to the Latian Company?

"A. The discussion that – Yes, there was.

"Q. What was that discussion?

"A. The discussion was that I explained to them that any line of credit for Latian should be submitted to the head office. It will depend on the approval from the head office.

"Q. Did you explain to them what the head office was?

"A. Not necessarily. They didn't ask anything, and so I said that I need the authorization from the head office for the approval.

"Q. Did you say where the head office was?

"A. In Rio de Janeiro."

Of these two conflicting versions, *Latian's own counsel,* who was present at the meeting, seems to agree with Stefanon and, by strong implication, rejects any "private conversation" between Amanollah and Stefanon. Mr. Nagata testified:

"Q. And is it your recollection that at this meeting, Mr. Stefanon advised everyone present that the request that was before him would require the head office approval of Banco do Brasil?

"A. Yes.

"Q. Okay. And do you recall that during this meeting, he also asked for financial information from Latian, which he intended to pass on to the head office?

"A. Yes.

"Q. Do you recall what that financial information was that he asked for?

"A. Not exactly.

"Q. When Mr. Stefanon described the bank's position on the transaction, did you understand what he was saying?

"A. Yes.

Footnote 12 continued.

the then outstanding Kudsy debt would have to be reduced by $500,000 before the deal could be approved. Following this meeting, Stefanon, on July 26, 1982, submitted a lengthly written report to Banco's home office (see the last paragraph of fn. 12, *ante,* and the reference to Ex. 49) recommending approval of the transaction allowing Latian to assume Kudsy's bank debt and to provide credit availability up to $1.6 million, for a period of six months, upon certain conditions. However, this report was based upon the assumption that the transaction would close upon the terms and conditions spelled out in the written contractural agreement signed by the parties on July 7,

Footnote 12 continued.

"Q. Okay. Was it your impression that the Sarbaz family, who was present during that meeting, also understood what he had said?

"A. Yes.

"Q. Do you recall that the transaction between Latian and Kudsy in fact did go forward, and those two parties closed on their transaction around August 25, 1982?

"A. That's my understanding.

". . . . . .

"Q. . . . Now, between July 21, 1982, after the meeting with the bank, and August 25, 1982, did you ever make a written request to Banco do Brasil to allow Latian to assume a $2 million line of credit?

"A. No, I didn't.

"Q. Did Mr. Manoucher Sarbaz ever ask you to author such a document during that time frame.

"A. I don't believe he did.

". . . . . .

"Q. Given everything that you knew about the Latian-Kudsy transaction, and given what you had heard at the meeting on July 21, was it not your understanding that if Banco do Brasil was to provide to Latian any $2 million line of credit, that the terms and conditions of such line of credit would have been set forth in writing?

"A. Yes.

"Q. And as you sit here today, sir, am I correct that you have never seen any written $2 million line of credit that was executed by Banco do Brasil and Latian?

"A. No. I never have.

Finally, Exhibit 49 in evidence is a written report sent, on or about July 26, 1982, by Stefanon to Banco's home office. This report, *written contemporaneously before any dispute arose,* is entirely consistent with the testimony of Stefanon and Mr. Nagata.

1982. Unfortunately, it did not.

By the time of the meeting of July 21, the respondents had inspected the Kudsy auto parts inventory and had concluded that a substantial portion was not marketable. After the meeting on July 21, the respondents entered into further negotiations with Koudsi and Antoci which resulted in the execution, in early August 1982, of an "addendum" to the July 7 contract. Under the terms of the addendum, Latian was given the right to "aggregate and transfer back" to Kudsy $442,000 in inventory which was to be designated "at the BUYER's [i.e., Latian's] discretion." In addition, from the total value of the inventory, as reduced by $442,000, there was to be deducted a further $100,000 as a "discount" from the original agreed purchase price.

This amendment to the transaction had the effect of reducing the total "value of the inventory" for the purpose of the sale transaction by $542,000 and in the bargain, gave Latian the right to select from the inventory the most marketable items and to return to the Kudsy companies the less desireable items. Finally, the addendum provided that if Latian were not successful, within one year of the closing date (which ultimately turned out to be August 25, 1982), in obtaining the Blaupunkt distributorship then held by Kudsy, the purchase price would be reduced by still another $100,000.

Thus, when the transaction closed on August 25, 1982, neither the total value of the inventory had been determined by the parties (i.e., the "independent valuation" provided for in the sale agreement had not taken place) nor had Latian determined which inventory items it would return to Kudsy.

Although Banco's representatives who attended the closing[13] stated, on Stefanon's instructions, that Banco would not oppose the transaction (i.e., the transfer of the inventory to Latian and its assumption of the secured inventory liability), there had been no action by Banco's

[13] This did not include Stefanon who was then away on vacation.

head office on Stefanon's letter of July 26, 1982, requesting a six-month credit line for Latian. Although Stefanon had specifically requested it at the meeting of July 26, as of the closing date Banco had not been supplied with any credit information on Latian or any of the respondents. However, during Stefanon's absence on vacation, members of his staff received communications from Banco's home office regarding the need for additional financial information.[14] This process was not completed by the time of the closing of the transaction on August 25, 1982.[15]

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[14] On August 6, 1982, Banco's head office had sent a letter to Stefanon requesting more information about the transaction including the Kudsy loan history and inquiring as to whether anything other than receipt of the new guarantees on the debt was required, that is, whether any further extension of credit was either necessary or desireable. Again on August 18, 1982, after being informed by one of Stefanon's assistant managers that Banco's approval of the sale transaction was required, the Banco head office requested further information including specifically the "new owner's schedule of investments in the business."

[15] Manoucher, although conceding that the requested financial information had not been supplied, and indeed was not supplied to Banco until after February 1983, nonetheless testified that at the closing his father, Amanollah, had stated to the Banco representatives (with Manoucher's translation) that "by signing this, we're going to get the line of credit. And if we are not going to get the line of credit, please tell us now because we are not going to close the deal." Manoucher also testified that Mr. Boiteux (Stefanon's assistant manager, who was one of the two representatives of Banco's Los Angeles Agency present at the meeting) responded that "you can –we will work with you and we'll cooperate with you. You are – you can use the line under the name of Kudsy's three companies until officially its transferred to your name . . . we will work with you, and we're not going to choke you." Mr. Boiteux denied making any such statements and claims that he stated only that Banco would not oppose the inventory transfer from Kudsy to Latian.

Nonetheless, the sale transaction, as modified by the addendum, closed on August 25, 1982. At that time, Latian and Amanollah signed the continuing guarantee agreement by which they undertook to guarantee Kudsy's inventory debt in a sum not to exceed $1,534,296.33. This sum was less than the higher figure originally discussed because of the reduction in the inventory which Latian had agreed to purchase. In addition, Stefanon, on behalf of Banco, had requested that there be a reduction of the total Kudsy indebtedness by $500,000 as a part of the transaction. This request was acknowledged and agreed to by Kudsy's letter of August 11, 1982.[16] On August 26, 1982, Latian took possession of the inventory and commenced selling it.

On September 8, 1982, following his return from vacation, Stefanon met with Amanollah and Manoucher. They explained why they had decided not to buy all of the inventory. By this time Stefanon was aware that Latian did not intend to take all of the inventory and he had been informed that as a result of this change in the transaction, Latian and Kudsy had agreed to split the $500,000 debt reduction payment requested by Banco,[17] $310,000 from Latian and $190,000 from Kudsy. At this meeting Amanollah delivered a check payable to Banco in the sum of $310,000. There is considerable conflict in the evidence as to the purpose and appropriate disposition of this check. Both Amanollah and Manoucher testified that

[16] In the letter of August 11, 1982, Koudsi and Antoci stated, "Persuant [sic] to your request, we are pleased to inform you that, in light of the pending deal with the Sarbaz's we have agreed to reduce our indebtedness with our Bank by $500,000.00 immediately after the approval by your Head Office of the Sarbaz's credit line."

[17] On September 7, 1982, the attorneys for Kudsy had sent a mailgram to Robert Nagata, the attorney for Latian, a copy of which was received by Stefanon on the same date. The mailgram stated, "... pursuant to an agreement with your client, Latian, Inc., Latian was required to pay Banco Do Brasil the sum of $310,000 on or before September 1, 1982, it is our understanding that said payment has not been made, demand is hereby made upon your client to make said payment to Banco do Brasil forthwith."

when they gave this check to Stefanon on September 8, they told him it was to be placed in an escrow account and held until approval of the line of credit was received from Banco's head office. Stefanon, on the other hand, denied that either of the Sarbazes said any such thing. He testified that such payment was accepted as a paydown on the $500,000 debt reduction on the secured obligations then due to Banco.[18] The contemporaneous records of Banco are consistent with Stefanon's testimony and reflect that these funds were in fact promptly applied to the debt.[19] Indeed, the record confirms that Manoucher was informed as to Banco's application of said $310,000 and he neither raised any objection thereto nor requested that his counsel do so.

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[18] It should be emphasized that the obligations due Banco were secured by the Kudsy inventory which was now in the possession of Latian and, since August 26, 1982, was being sold off.

[19] Such records reflected that the $310,000 check was placed in an "escrow deposit" account before the check cleared and the proceeds were applied to reduce the Kudsy debt. Stefanon testified that this was not a true escrow account but rather was a routine means utilized by Banco to account for deposited checks pending clearance, payment and determination of the proper account to be credited. Subsequently, on October 5, 1982, the respondents paid another $150,000 on account of the assumed Kudsy obligations. However, there was no escrow deposit account utilized with respect to that check. Stefanon explained the difference:

"Q. If those payments, the 150,000 and the 310,000, were for the notes of the Kudsy companies, why was one put into escrow and the other credited directly to the loans?

"A. When we received the first payment of the $310,000, we didn't know yet which notes to have apply. Because of the splitting between the Kudsies and the Sarbaz, notes have to be a split – split also between Kudsies and Sarbaz. [P.] And also the calculation of the interest. Because they decide that interest should be paid up to August 24 by Kudsy; after August 24 by the Sarbaz. [P.] So at the very beginning, when I came back from vacation September 10, we started doing those – the job as to split the loans. And take some time. That's why the money was applied to his escrow deposited, unrelated. [P.] Later on, when we received the payment of $150,000, we had already the notes immediately to be applied, because we had already decided which one to be applied."

Following the meeting of September 8, Stefanon wrote a report to Banco's home office regarding the changed nature of the transaction. He advised Banco that his Los Angeles Agency had been in the process of collecting the materials requested by Banco, "when we were informed by the interested parties that there would no longer be a total inventory transfer . . . . [P.] We request, therefore, that the proposal referred to in our letter . . . dated July 26, 1982, be suspended until it is substituted by another with the elements of the new position." Much was later made of this letter, with counsel for the respondents arguing that Stefanon, without telling the respondents, had requested that Banco give no further consideration to their request for a credit line.[20]

Thereafter, on or about September 27, 1982, Stefanon met again with Amanollah and Manoucher to discuss their failure to have signed, on August 25, all of the documentation necessary to their assumption of the Kudsy obligations. The missing document was a Security Agreement in which Latian was described as the "Debtor" and the Kudsy companies were denominated the "Borrowers." A printed form was modified for this purpose and it described the security as "All inventory of Debtor now owned or hereafter acquired . . . and All proceeds" of such collateral. This agreement also incorporated a special "Addendum to Security Agreement" which stated that, "To induce Secured Party [i.e., Banco] from time to time to make line of credit facilities available *to Borrowers,*

[20] This request for suspension of the proposal was the subject of considerable attention and advocacy at trial by counsel for the respondents. However, this language comes from the English translation of Stefanon's letter which was actually written in Portuguese. In the original, the statement actually made by Stefanon was that the "*reviewing* of the proposal . . . be stopped until it is submitted by another with the elements of the new position." (Emphasis added.) By this, Stefanon testified that all he intended to communicate was the fact that the deal described in the July 26 letter had been changed by the parties and Banco should not waste further time on it but rather should await a new report which in fact was subsequently submitted on November 5, 1982.

Debtor agrees [to maintain a certain minimum inventory value, to give a proper notice to Secured Party in the event of a sale of assets other than inventory in the ordinary course of business and to provide monthly inventory reports and]... (4) At the time of a request for utilization of any line of credit *by any Borrower,* to provide to Secured Party a Compliance Certificate [in a particular described form]".[21] (Emphasis added.) This document was signed by Latian, as debtor, on September 27 and Banco signed on October 21, 1982.

Subsequently, on or about October 6, 1982, Stefanon met with Amanollah and Manoucher. At this time, Stefanon was informed that the respondents were unhappy with the Kudsy people, particularly Koudsi and Antoci. Apparently differences had arisen as to how to operate the business.[22] Stefanon testified that Manoucher requested that Latian be given its own line of credit separate from Kudsy. Stefanon replied that he would do his best to provide it and would submit a proposal for such a credit line.

On November 5, 1982, Stefanon wrote to Banco and explained that the original transaction had changed. Latian would not be taking all of the inventory and had agreed to assume no more than $1,534,000 of Kudsy's total indebtedness to Banco. The $310,000 payment (made on September 8) was described as a "partial payment of the commitment [which Latian] had assumed." This report also described the deteriorating relationship between the Kudsy owners and the respondents and the fact that Koudsi and Antoci were contemplating bankruptcy. This

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[21] The record relfects that neither Latian nor Kudsy at any time prepared or submitted a Compliance Certificate which, under the terms of this Addendum to Security Agreement, was required before any credit line advance or utilization could occur. The significance of this Addendum is discussed below in connection with our review and application of the parol evidence rule.

[22] Indeed, those differences had become so serious that Koudsi was discharged from his position with Latian. Under the terms of the original agreement, he was to be employed for a twelve-month period to assist the respondents in learning and developing the business.

was of concern because they were liable for the entire debt due Banco. Stefanon stated that since "Latian Inc. [had] committed itself to such an extent that it would not accept a cancellation [and had] practically assumed the control of the business, with the only debt being that [due] to [Banco]," Stefanon (in the absence of a different authorization from Banco) had agreed to the partial sale of inventory to Latian based upon "the guaranties, Latian's UCC-1, personal guaranties of its owners, and insurance policy endorsed in favor of the Bank." In this way, Stefanon concluded, at least "part of the debt would be protected against the bankruptcy of [Kudsy]."[23] After describing the unpaid obligations[24] and applying the two payments made by Latian of $310,000 and $150,000, the total remaining debt for which Latian was liable was $1,072,876.33. Stefanon stated that Latian had agreed "to liquidate this balance in 12 monthly installments of

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[23] Respondents argued at trial, and reassert here, that this communication was "proof" of the perfidy and fraudulent scheme of Stefanon and Banco. By inducing Latian to become obligated for Kudsy's debts, Banco acquired another debtor who could pay in the event of Kudsy's default. This argument is difficult to accept. Apart from the fact that it was good banking practice to insist upon such guarantee by Latian before agreeing to the transfer of the secured inventory from Kudsy to Latian, this assumption of indebtedness was the idea of the respondents, not Banco. Such debt assumption proposal was an integral and consistent part of every one of the offers made to Kudsy to purchase its assets, including the three which were submitted before Banco ever became involved in the transaction.

[24] The Kudsy obligations which Latian had assumed were:

Kudsy Company	Original Debt Assumed	Balance after Latian's Payment of $460,000
Wholesale Autoparts Supply Inc.	$ 89,890.00	$ 89,890.00
Herbert Albrecht Autoparts Inc.	875,943.00	611,613.00
J. Kudsy & Co., Inc.	568,463.33	371,373.33
TOTALS	$1,534,296.33	$1,072,876.33

approximately equal amounts with interest at 15% per annum."[25]

After recommending vigorous collection activities for the portion of Banco's unpaid debt which was the sole responsibility of the Kudsy companies, Stefanon concluded his report with the statement that, "it is in our interest that Latian Inc. continue operating, which depends on the support of the Bank." To express such support, Stefanon proposed that Banco, as an exception[26] grant Latian a fixed credit ceiling of $1,100,000 (to cover the debt already assumed) plus a revolving credit line of $800,000.[27] Stefanon asked that his revolving credit line be valid for a period of six months, at which time a reevaluation of Latian's credit position could be made.

Banco responded to Stefanon by a telex dated November 18, 1982, and, among other things, requested a copy of Latian's opening balance sheet. Stefanon called Manoucher and requested that he provide such balance sheet. Manoucher replied that it was being prepared and would be provided later. He orally advised Stefanon that the paid-in capital was $800,000 which Stefanon accepted, as he was in a rush to respond to Banco's request for financial information. He communicated such information to Banco on November 19. As of this date, no financial documents had been supplied to Banco. The requested financial statement, allegedly in preparation in November

[25] Stefanon testified that the respondents had agreed to this repayment structure at the meeting held on or about October 6, 1982. The original Kudsy obligation to Banco, which Latian had assumed on August 25, 1982, required a payoff by December 31, 1982.

[26] As Stefanon explained it, an "exception" was required because an extension of such credit was beyond Stefanon's authority and Banco's parameters as Latian had no financial track record.

[27] Of this proposed credit line, Stefanon recommended that it be distributed as follows:

Internal Credit	$100,000
LISP (credit for Brazilian business)	500,000
Other foreign business	200,000
	$800,000

1982, was not in fact delivered to Stefanon until April 15, 1983.[28]

In December 1982, Stefanon met with Manoucher at the bank's Los Angeles Agency offices. Manoucher inquired about the status of the line of credit and stated that Latian was having financial difficulties and was going to have trouble meeting its obligation to Banco. Stefanon approved an additional loan (for 90 days) of $50,000 to be used to apply on a $57,000 interest payment which was then due. As a result of this disclosure of Latian's financial problems the parties entered into discussions regarding the restructure of the debt obligations which Latian had undertaken. Although Manoucher, in his testimony, stated that he did not know that the Kudsy debt which had been assumed was all due and payable by December 31, 1982, the record makes clear that he indeed must have known such fact.[29]

[28] Manoucher testified that this financial statement was prepared in February 1983 [but apparently not submitted to Banco until April 15, 1983] and reflected a value for common stock of $750,000. However, he admitted that this was incorrect and that the amount of paid-in stock was only $100,000 when Latian was formed in May 1982. While no further capital was provided to Latian, Manoucher testified that substantial sums (in excess of $1,000,000) were provided to the company (this included the $460,000 paid to Banco on the Kudsy debts), presumably in the form of loans or advances and it was the respondents' intent to convert $650,000 of this amount to paid-in capital stock.

[29] On July 26, 1982, counsel for Banco had supplied to Mr. Nagata, the attorney representing the respondents, a complete schedule of all of the notes and obligations of Kudsy as they then existed. Those documents, which Manoucher concedes were sent to his counsel, but which he says he never reviewed consisted of a computer printout listing all of the outstanding notes given to Banco by the four Kudsy companies, and reflecting the total amounts due, interest paid and owing *and the due dates*. In addition, Latian had received from Banco sometime prior to October 18, 1982, a document setting forth the loan schedule on which Latian was expected to make payments. This schedule reflected that the total then owing on the debt assumed by Latian was $1,223,501.86 and that it would all be due by December 31, 1982. When Banco received Latian's payment of $310,000 it notified Latian how it had applied that payment. The copy of the loan schedule obtained from Latian's files reflected notations regarding such application written by Manoucher.

Obviously, a restructure of the payment schedule of the monies due Banco was very important to the respondents. Although there is conflicting testimony on the point, it is also clear that Manoucher, on behalf of Latian, requested that the interest rate be reduced and the payments extended over 18 rather than 12 months. This was favorably considered by Stefanon and in early January 1983, Banco's attorneys began preparing drafts of the necessary documents.[30]

On January 19, 1983, Stefanon was advised by Banco that his November 5, 1982 request for approval of Latian's purchase of the Kudsy inventory and assumption of related debt, payable over a twelve month period, was approved; however, his request for the extension of a revolving $800,000 line of credit was refused. According to Stefanon, this information was immediately communicated to Manoucher by telephone as well as to Banco's attorneys who then were in the process of completing work on the restructure documents.[31]

On the next day, January 20, 1983, Banco's attorneys sent the restructure documents to counsel for respondents. They were reviewed by said counsel and Manoucher carefully read them to make certain that they reflected the agreement which had been reached with Banco regarding the payment of the outstanding obligations which Latian had assumed. He also carefully explained the documents to his father before they were signed. That explanation included the fact that this agreement was the *entire agreement* between the parties and that it contained no provision for a "$2 million line of credit." There can be

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[30] In his testimony Manoucher denies that any request for an 18 month repayment schedule was ever made. However, that testimony is directly contradicted by the subsequent written restructure documents which he read, approved and signed without oral or written objection. Respondents are *conclusively* bound by such written recitals. (Evid. Code, § 622.)

[31] However, Manoucher denies that he was ever advised by Stefanon prior to June 1983 that the credit line had been refused. (See discussion, *post*.)

little doubt that both Manoucher and Amanollah clearly understood.

The restructure of the debt relationship is set forth in the Guaranty Agreement and it recites and acknowledges certain facts which are conclusively presumed to be true. (Evid. Code, § 622.)[32] Specifically, the Guaranty Agreement states:

"A. Latian and Sarbaz [i.e., Amanollah] are joint and several guarantors of any and all indebtedness (the 'Indebtedness') of J. Kudsy & Co., Inc., Herbert Albrecht Autoparts, Inc. and Wholesale Autoparts Supply, Inc. (the 'Borrowers'), existing on August 25, 1982 (and any renewals and extensions thereof), up to a principal amount of $1,534,296.33, pursuant to a Continuing Guaranty of Latian and Sarbaz in favor of the Bank dated August 25, 1982 (the 'Guaranty').

"B. The Borrowers are in default in payment of the Indebtedness and the Bank has made demand upon the Borrowers for payment of the Indebtedness. The Borrowers have failed to make such payment.

"C. The Bank has also made demand upon Latian and Sarbaz to make payment on the Indebtedness pursuant to the terms of the Guaranty. *Latian and Sarbaz* have made partial payments on the Indebtedness and *have requested that the indebtedness* remaining unpaid on January 1, 1983 (which Indebtedness remaining unpaid is $1,072,874.51) *be repaid in 18 consecutive monthly*

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[32] Evidence Code section 622 provides:

"The facts recited in a written instrument are conclusively presumed to be true between the parties thereto, or their successors in interest; but this rule does not apply to the recital or a consideration."

For reasons that are not at all clear in the record, the trial court, in response to a motion *in limine* filed by Banco, ruled that the conclusive presumption provision of section 622 would have no application with respect to the Guaranty Agreement. We perceive of no valid legal basis for this conclusion. Respondents' argument that they were induced to execute this agreement by Banco's promissory fraud, and therefore are not bound by any provision of that agreement, has no more validity on this issue than it does with respect to the parol evidence rule discussed below.

installments, together with interest, as hereinafter provided and the Bank has agreed, all on the terms and subject to the conditions hereinafter set forth.

"

"1. *Acknowledgement of Guaranty.* Latian and Sarbaz each acknowledge their joint and several obligations under the Guaranty to pay the Indebtedness and agree that such obligations are absolute *and unconditional.*" (Emphasis added.)[33]

After setting forth the terms, conditions and security for the repayment of this indebtedness, the following integration clause is set forth: "4. *Entire Agreement: Amendment.* This Agreement together with exhibits attached hereto,[34] *embodies the entire agreement and understanding among the parties hereto and supersedes all prior agreements and understandings relating to the subject matter hereof.* This Agreement may not be amended or altered except by a writing duly executed by each of the parties hereto." (Emphasis added.)

Manoucher testified that he understood this integration clause and he conceded that no written amendment was

[33] Although this paragraph is not included in the "Recital" portion of the Guaranty Agreement, it nonetheless constitutes a recital of one of the background and existing facts which serve as a predicate for the agreement entered into by the parties.

[34] The attached exhibits were:

1. A promissory note for $1,072,874.51, executed by Latian;

2. A Continuing Guaranty executed by Amanollah Sarbaz, replacing the one signed by him on August 25, 1982 in which he and Latian had agreed to guarantee the Kudsy indebtedness up to a maximum of $1,534,296.33. By this instrument he agreed to guarantee the debt of Latian only up to the amount of $1,072,874.51. The prior guaranty subsequently returned to him by Banco;

3. The Security Agreement, dated September 27, 1982, with Addenum thereto, which we have previously described and discussed. This is the document which describes Latian as "Debtor," the Kudsy companies as "Borrowers" and Banco as "Secured Party." In addition to its relevance to the parol evidence issue, the incorporation of this earlier security agreement into the restructured debt arrangement would seem to confirm Stefanon's testimony that no *separate* credit line was ever recognized or agreed to for Latian.

thereafter made. He also admitted that during the time that his attorneys were negotiating this agreement he never asked them to make any provision for a $2 million line of credit.

It is on this restructured obligation which Banco has based this action.[35] Latian made the payments called for under this agreement for February and March 1983, but did not make any further principal payments, although interest payments were made through December 1983. In May of 1983, Latian obtained a line of credit from another bank (Capistrano Bank) which ultimately rose to approximately $500,000. In support of its application for credit, Latian and Amanollah provided Capistrano Bank with financial information which reflected that as of May 1983 Latian had a net equity of $535,648 and Amanollah had a personal net worth of $11,268,000. Manoucher testified that his financial information which was supplied to Capistrano Bank was true and correct.

Manoucher testified, contrary to the testimony of Stefanon, that the respondents were never informed at any time during January through May 1983, that Banco had refused to extend to them a line of credit. Thus, on July 25, 1983, the respondents' attorney, Robert Nagata, wrote to Stefanon and complained about the failure to make a "line of credit available for Latian, not withstanding your prior promises and representations."[36] Mr. Nagata stated that failure to provide this credit extension had resulted in financial difficulties for Latian and if Banco continued to refuse to provide a credit line, Latian would file suit. However, the parties apparently were having ongoing discussions regarding credit extensions and $40,000 was loaned to Latian on a 30-day note on June 23, 1983. In addition, in December 1983, Banco agreed to

[35] Also, it was on the basis of the extensive documentation of the restructured indebtedness agreement that Banco argued at trial the bar of the parol evidence rule.

[36] As we point out below, this was the first time that any *written document* from the respondents or their counsel made any reference to a line of credit for Latian.

provide a $200,000 90-day revolving line of credit to Latian. Two draws were taken by Latian: on December 6, 1983, it borrowed $5,685.17 on a 62-day note and on December 31, 1983, it borrowed $11,927.11 on a 60-day note. None of these sums was ever repaid.

In December 1983, Latian had stopped making even interest payments. Thereafter, on behalf of himself and Latian, Amanollah met with Stefanon and offered Banco three options: (1) provide the $2 million line of credit, (2) retain the guarantees from Latian and Amanollah, but release Banco's security interest so that Latian could obtain a line of credit from another lender or (3) foreclose on the security and take Latian's inventory in satisfaction of the debt. Banco declined to accept any of these alternatives.[37]

Latian retained, and presumably sold, the auto parts inventory purchased from Kudsy which had been security for the repayment of the sums due Banco. No accounting for such sales has apparently even been made and Banco received no credit therefore in the judgment entered against it.

CONTENTIONS

Banco in its appeal makes six principal arguments.

1. There was insufficient evidence to establish the formation of a contract whereby Banco would provide to Latian and Amanollah a "$2 million line of credit."[38]

2. There was insufficient evidence to establish fraud against either Banco or Stefanon;

3. There was insufficient evidence to establish the damages awarded by the trial court or, indeed, any

[37] Nor was it obligated to do so. This obviously was not an offer of rescission. It was simply an attempt by Latian to renegotiate its debt position with Banco. However, respondents urge that Banco's failure to accept one of these alternatives precludes its objections to a damage award which returned to Latian and Amanollah *all* of the money they had paid Banco and Kudsy *and* allowed them to retain the auto parts inventory as well.

[38] Included within this contention is Banco's argument that the trial court's ruling with respect to the parol evidence rule was in error.

damages, whether based on contract or fraud and, further, that the compensatory damages were improper and duplicative;

4. There was no evidentiary or legal basis for an award of punitive damages against either Stefanon or Banco;

5. As there is no dispute that Latian failed to pay the obligations to Banco which it had agreed and undertaken to do, Banco is entitled to judgment notwithstanding the verdict; and

6. Banco was denied due process of law when its motion for a new trial was not heard or decided by the trial judge.

For their part, respondents contend that the trial court abused its discretion in conditionally granting a new trial and that the punitive damage awards, reduced by respondents' acceptance of the remittitur, should be restored.

As we conclude that the parol evidence rule barred the essential evidence relied upon by respondents and that, in any event, such evidence, when examined in light of the whole record, was not sufficient to demonstrate a binding commitment or promise, we need only reach one of the other issues raised by Banco.[39] In light of our conclusions, the issues raised by respondents in their cross-appeal are moot.

DISCUSSION

The entire case asserted by respondents, both in defense of Banco's complaint and in support of their successful claims for affirmative relief, is based upon the allegation that Banco orally promised to provide a $2 million line of credit to Latian and failed to honor that commitment. Respondents sought and obtained relief on the theory of breach of contract and, claiming that Banco's promise

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[39] That other issue is Banco's claim that it is entitled to judgment on its complaint. In view of the conclusions we reach with respect to the assertions of respondent, we concur with Banco on this point. (See discussion, *post.*)

was falsely made, on fraud as well.[40]

Banco argued at trial and urges here that evidence of the collateral oral agreement upon which respondents base their case should have been excluded under the parol evidence rule.[41] Banco also argues that, in any event, the evidence was not sufficient to establish that Banco had in fact made a commitment or promise to provide such line of credit. We consider each of these arguments in turn.

1. *The Parol Evidence Rule*

In California, the parol evidence rule is statutorily

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[40] We do not overlook that respondents also claim that Banco falsely represented the financial standing and strength of Kudsy. We discuss that contention elsewhere and conclude that, in any event, it is totally without merit as a matter of law.

[41] We note with some dismay that Banco's original briefs do not devote the substantial effort which this issue clearly requires. Indeed, their two briefs, totaling 191 pages spend less than one page discussing this critical and potentially dispostive question. This meager effort is somewhat surprising in light of the time devoted to the issue in the trial court. However, it is enough to avoid the claim asserted by respondents that the point has been waived. We also note that "The rule requiring an adequate legal argument . . . is largely for the convenience of the reviewing court. And, since the court may decide a case on any proper points or theories, whether urged by counsel or not, there is no reason why it cannot examine the record, do its own research on the law, or accept a belated presentation." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 480, p. 471.) Following oral argument, we gave the parties an opportunity to file supplemental briefs on this issue; these were ultimately received and have been considered.

defined in Code of Civil Procedure section 1856.[42] It provides that where the parties to a contract have set forth the terms of their agreement in a writing which they intend as the final and complete expression of their understanding, it is deemed integrated and may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. (2 Witkin, Cal. Evidence (3d ed. 1986) § 967, pp. 915-916.)

a. *Nature of Rule and De Novo Review*

This "is not merely a rule of evidence excluding precontractural discussions for lack of credibility or

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[42] Code of Civil Procedure, section 1856, as amended in 1978, provides: "(a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or or a contemporaneous oral agreement.

"(b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement.

"(c) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by course of dealing or usuage of trade or by course of performance.

"(d) The court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement.

"(e) Where a mistake or imperfection of the writing is put in issue by the pleadings, this section does not exclude evidence relevant to that issue.

"(f) Where the validity of the agreement was is the fact in dispute, this section does not exclude evidence relevant to that issue.

"(g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud.

"(h) As used in this section, the term agreement includes deeds and wills, as well as contracts between parties."

The rule also has a foundation in Civil Code section 1625, which provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

reliability. It is a rule of substantive law making the integrated written agreement of the parties their exclusive and binding contract *no matter how persuasive the evidence* of additional oral understandings. Such evidence is legally irrelevant and cannot support a judgment. [Citation.]" (*Marani* v. *Jackson* (1986) 183 Cal.App.3d 695, 701, emphasis in the original; see also *BMW of North America, Inc.* v. *New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980, 990.)

The resolution of the issue of whether the rule applies so as to exclude any collateral oral agreement is one of law to be determined by the court. (Code Civ. Proc., § 1856, subd. (d); *Kaufman & Broad Bldg. Co.* v. *City & Suburban Mortg. Co.* (1970) 10 Cal.App.3d 206, 215-216; *Salyer Grain & Milling Co.* v. *Henson* (1970) 13 Cal.App.3d 493, 499; *Brawthen* v. *H & R Block, Inc.* (1972) 28 Cal.App.3d 131, 137; *Wagner* v. *Glendale Adventist Medical Center* (1989) 216 Cal.App.3d 1379, 1385-1386.) We are therefore not bound by the trial court's determination that the Guaranty Agreement was not integrated and that evidence of a collateral oral agreement was therefore admissible. We will consider and resolve the issue de novo. (*Wagner* v. *Glendale Adventist Medical Center, supra,* 216 Cal.App.3d at p. 1386.)

b. *Application of the Rule*

"In its actual application the rule is, however, limited to those cases where the parties intended the writing to be complete unto itself." (*Salyer Grain & Milling Co.* v. *Henson, supra,* 13 Cal.App.3d at p. 498.) "It is based upon the premise that the written instrument *is* the agreement of the parties. [Citation.] Its application involves a two-part analysis: 1) was the writing intended to be an integration, i.e., a complete and final expression of the parties' agreement, precluding any evidence of collateral agreements [citation]; and 2) is the agreement susceptible of the meaning contended for by the party offering the evidence? [Citation.] (*Gerdlund* v. *Electronic Dispensers International* (1987) 190 Cal.App.3d 263, 270.) Put another way, "If a writing is deemed integrated, extrinsic evidence

is admissible only if it is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. [Citations.]" (*Bert G. Gianelli Distributing Co.* v. *Beck & Co.* (1985) 172 Cal.App.3d 1020, 1037, fn. 4.) We will discuss these two issues separately.

(1) *The January 1983 Guaranty Agreement Was Integrated*

The crucial issue is whether the parties *intended* the written instrument to serve as the exclusive embodiment of their agreement. (*Salyer Grain & Milling Co.* v. *Henson, supra,* 13 Cal.App.3d at p. 498.) "The instrument itself may help to resolve that issue. It may state, for example, that 'there are no previous understanding or agreements not contained in the writing,' and thus express the parties' 'intention to nullify antecedent understanding or agreements'. (See 3 Corbin, Contracts 1960) § 578, p. 411.)" (*Masterson* v. *Sine* (1968) 68 Cal.2d 222, 225-226.) Indeed, if such a clause is adopted and used by the parties, it may well be conclusive on the issue of integration. (*Sayler Grain & Milling Co.* v. *Henson, supra,* 13 Cal.App.3d at p. 501; Rest.2d Contracts, § 216, Com. e, p. 140.)

In order to resolve this threshold issue, the court may consider all the surrounding circumstances, including the prior negotiations of the parties. (*Masterson* v. *Sine, supra,* 68 Cal.2d at p. 226.) "In determining the issue, the court must consider not only whether the written instrument contains an integration clause, but also examine the collateral agreement itself to determine whether it was indeed to be a part of the bargain. [Citations.] However, in determining the issue of integration, the collateral agreement will be examined only insofar as it does not directly contradict an express term of the written agreement; 'it cannot reasonably be presumed that the parties intended to integrate two directly contradictory terms in the same agreement.' ([*Gerlund* v. *Electronic Dispensers International* (1987)] 190 Cal.App.3d at p. 271.) In the case of prior or contemporaneous representations, the collateral agreement must be one which might naturally be made as a separate contract, i.e., if in fact agreed upon need not certainly have

appeared in writing. [Citation.]" (*Wagner* v. *Glendale Adventist Medical Center, supra,* 216 Cal.App.3d at p. 1386.)

The resolution of the question of integration also requires, as the court in *Masterson* explained, the accommodation of at least two policy considerations. The first "is based on the assumption that written evidence is more accurate than human memory. [Citation.] This policy, however, can be adequately served by excluding parol evidence of agreements that directly contradict the writing. [The second] policy is based on the fear that fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of facts. [Citations.] "(*Masterson* v. *Sine, supra,* 68 Cal.2d at p. 227.) This fear, which is at the heart of the concern of this second policy consideration, can be alleviated by indicia of credibility. The court in *Masterson* suggested two such indicia. The first of these, taken from the Restatement of Contracts section 240 (§ 216 in Rest.2d Contracts), states that "An oral agreement is credible if it might naturally have been made as a separate agreement by parties similarly situated." (*FPI Development, Inc,* v. *Nakashima* (1991) 231 Cal.App.3d 367, 388, fn. omitted.) A second and related indicia, based on Uniform Commercial Code section 2-202, rests upon the proposition that an oral agreement is also "creditable unless it can be said with certainty that the parties would have included that oral agreement in the writing." (*Ibid.*)

From the foregoing, we perceive that an analysis based on the examination of four questions is appropriate: (1) does the written agreement appear on its face to be a complete agreement; obviously, the presence of an "integration" clause will be very persuasive, if not controlling, on this issue; (2) does the alleged oral agreement directly contradict the written instrument; (3) can it be said that the oral agreement might naturally have been made as a separate agreement or, to put it another way, if the oral agreement had been actually agreed to, would it certainly have been included in the written instrument; and (4)

would evidence of the oral agreement be likely to mislead the trier of fact. (*Malmstrom* v. *Kaiser Aluminum & Chemical Corp.* (1986) 187 Cal.App.3d 299, 314; *Brathen* v. *H & R Block, Inc.* (1975) 52 Cal.App.3d 139, 146.)

(a) *The Written Agreement is Complete.* An examination of the Guaranty Agreement leaves no doubt that it is complete and was intended by the parties to be a complete expression of their understanding. On its face, it purports to fully describe the entire restructured debt relationship among the parties. Most importantly, however, it contains an express "integration" clause. This provision, which the respondents concede they read, understood and discussed with their attorneys, specifically provided that the Guaranty Agreement "embodies the *entire agreement* and understanding among the parties herto and *supercedes all prior agreements and understandings* relating to the subject matter hereof." (Emphasis added.) It is difficult to imagine how the parties could have more clearly expressed their intent to make the written instrument a full and complete expression of their agreement.

(b) *The Oral Agreement Directly Contradicts the Written Instrument.* Respondents' argument to the contrary notwithstanding, there can be no question that the claimed oral agreement directly contradicts the written Guaranty agreement. According to the record, the oral agreement which is claimed by respondents to have been an *indispensable condition* to their obligations under the written Guaranty Agreement.[43] The testimony offered by respondents repeatedly emphasized that the "promised" line of credit was *critical* to Latian's purchase of the Kudsy inventory and indeed was a *condition*, absent the perfor-

[43] Respondents argue that evidence of a condition precedent to a contract is not barred by the parol evidence rule. That is generally true, "unless the written contract includes express provisions inconsistent with the condition." (*Haines* v. *Bechdolt* (1965) 231 Cal.App.2d 659, 661.) As we point out, the very claim that their obligation to Banco was conditional is one of the major contradictions between the claimed oral agreement and the express provisions of the written Guaranty Agreement.

mance of which, they would not have assumed the obligations of such purchase. That the extension of such a line of credit was a critical condition of the deal was stated several times in the testimony offered by respondents[44]

[44] Indeed, Manoucher testified on examination by counsel for Banco that he had instructed his attorney with regard to the matter.

1. With respect to the next to last offer to Kudsy, dated June 25, 1982, Manoucher testified as follows:

"Q. Did you instruct your attorney to put into this document a condition of the deal which said in essence if we don't get the $2 million line of credit from Banco do Brasil, we don't have a deal?

"A. As I remember, yes.

"Q. Your answer is yes?

"A. Yes.

"Q. And do you know where in the document this condition exists?

"

. . . . . .

"Q. Do you see there, Mr. Sarbaz, a condition designed to protect what you've testified was very important to you? And that is that the deal would turn on whether Banco do Brasil would give Latian a $2 million line of credit.

"A. I couldn't find it, no."

2. With respect to the final offer of July 7, 1982 which was accepted by Kudsy, Manoucher testified:

"Q. Okay. The agreement is again with Latian as the purchaser, and the concept is that Latian will purchase all of the assets of the companies as stated in paragraph 1-A; is that correct?

"A. That is true.

"Q. Okay. This document was prepared by Mr. Nagata?

"A. Yes, sir.

"Q. With your involvement?

"A. Yes, sir.

"Q. With your input?

"A. Yes, sir.

"Q. And you reviewed it before it was signed by your father?

"A. Yes, sir.

"Q. And you recommended to him that he sign it, didn't you?

"A. Yes, sir.

"Q. And you satisfied yourself before he signed it that it accurately reflected the deal between yourself and the Kudsy companies, didn't you?

"A. Yes, sir.

"Q. And at the time this document was signed, Mr. Sarbaz, isn't it true that you considered the $2 million line of credit that you've talked

Footnote 44 continued.

and was asserted by their counsel as the foundation of his damage arguments and is repeated in the briefs before this court. Thus, it is obviously the position of respondents that the granting of the line of credit was a condition of their entire obligation. This is, however, entirely and directly inconsistent with an express term of the integrated written agreement: "Latian and Sarbaz each acknowledge their joint and several obligations under the Guaranty [the original Guaranty agreement executed in favor of Banco on August 25, 1982] to pay the Indebtedness and agree that such obligations are absolute and *unconditional.*" (Emphasis added.) It is simply not possible to reconcile the respondents' claim of an oral condition on which their liability to Banco depends with their expressed written commitment that there are no conditions to such liability.

(c) *The Claimed Oral Agreement Would Not Naturally Have Been Made the Subject of a Separate Agreement.* This issue can best be addressed by examining not only the written Guaranty Agreement, but also the entire transaction. Such surrounding circumstances provide the context in which the Guaranty Agreement was negotiated and executed. First, it must be emphasized that respondents were sophisticated and experienced businessmen who were at all times, from the very outset of their

Footnote 44 continued.

about previously to be very significant to this transaction?

"A. Yes, sir.

"Q. And the $2 million line of credit that you had hoped to get from Banco do Brasil; right?

"A. Right.

"Q. At the time you had Mr. Nagata put this contract in writing, did you instruct him to include a specific, precise condition which stated in essence that the deal would only go through if Latian got a $2 million line of credit from Banco do Brasil?

"A. Yes, sir.

"Q. You instructed him to do that?

"A. Yes, sir."

An examination of these documents, of course, reflects no mention whatever of any condition regarding the availability of a line of credit in any amount.

involvement with the Kudsy companies, advised, counseled and assisted by attorneys of their own choosing. The record clearly reflects that respondents were both cautious and deliberate with respect to their negotiations and agreements in this matter. Their renegotiation and restructuring, prior to the August 25, 1982 closing, of the fundamental terms of their original purchase agreement with the Kudsy companies is particularly telling. It is with that background that the events leading to the negotiation and execution of the Guaranty Agreement must be examined.

In December 1982, the respondents, unable to meet the obligation they had undertaken to Banco in the original August 1982 purchase transaction, sought an extension of the time in which such repayment could be made as well as a reduction of their interest rate burden. This was a major debt restructuring which was sought by the respondents and negotiated by them with the continuous aid and assistance of their counsel. A significant part of this context is the fact that, according to respondents, Banco has failed to deliver on the promised $2 million line of credit for over six months at the time the restructure documents were negotiated and drafted; yet not one word about such line of credit appears in the documents or in any other contemporaneous writing or correspondence.

Nonetheless, the trial judge, with such documents and all of this background before him, concluded that the oral collateral agreement relied upon by respondents was "a naturally separate agreement" from the Guaranty

Agreement.[45] According to his comments from the bench when he made such determination, he was persuaded to this conclusion by the language contained in the Addendum to the Security Agreement executed on September 27, 1982, which was included in and made a part of the January 1983 documents. The language in the Addendum to which the judge referred stated; "To induce Secured Party from time to time to make line of credit facilities *available to Borrowers,* Debtor agrees . . ." (Emphasis added.)

The trial court concluded that such "language suggests that there was some arrangement between these parties involving a line of credit, and they do not say what that arrangement is. They don't say it. That language does not indicate it. . .[P.] So I'm convinced that the document is not integrated."

The trouble with the court's conclusion is that its premise was faulty and, in any event, it misses the point. First, the language to which the court referred anticipates line of credit extensions *to Kudsy* not Latian. The Addendum indentified Kudsy as the "Borrowers" and Latian as the "Debtor." The January 1983 documents represented a restructure of the prior debt arrangement (a three way transaction which involved Kudsy as the principal obligor) in which Banco agreed to make an entirely separate and

[45] Curiously, just a few minutes before reaching and announcing this conclusion, the court expressed a contrary view in remarks which he addressed to respondents' counsel:

"THE COURT: There is no question but what you lawyers were there advising these people. And I have a very – I just have a very difficult time understanding, with the advice of counsel, if something was that important they would not have it included in the contract. [P.] and it seems to me that since it was important, and since the 1983 agreement actually makes mention of not only payment schedules, which I think must have been intended to be influenced somewhat by the line of credit, I can't imagine somebody extending somebody a line of credit on a transaction when a schedule of payments with that line of credit not being expected to have any kind of influence on the scheduled payments. [P.] That being the case, it seems to me that that would make it really a natural party of this agreement, and particularly when the agreement actually makes reference to lines of credit.

extended payment agreement with Latian with respect to its assumed portion of the original Kudsy debt. The Addendum makes no reference whatever to any line of credit availability to Latian. The trail court simply misread the documents.[46]

Second, that there may have been some prior, or even pending, discussions regarding a possible extension of a line of credit in the future is of no help in avoiding a conclusion of integration. If a prior binding commitment had been made as opposed to incomplete negotiations, it would seem obvious, if not compelling, that the terms of such a credit arrangement would have been included in the very written agreement which purported to fully describe the entire debt relationship of the parties. Indeed, respondents themselves repeatedly have asserted that the claimed oral agreement was an integral and indispensable part of the entire transaction.[47] Even their own attorney

[46] We do not overlook respondents' emphasis on a statement contained in the printed form portion of the Security Agreement which is attached as an exhibit to the Guaranty Agreement (The Addendum referred to by the trial judge was a *typed* exhibit to the Security Agreement). Respondents rely upon the printed statement that "as an inducement to Secured Party [i.e., Banco] to extend credit to Debtor [i.e., the oral agreement which they advance) existed with respect to future credit extensions. We reject this argument. This printed language was included in the security instrument executed by the parties in September of 1982 in connection with the obligations assumed by Latian in the August 25, 1982 closing. It spoke only of an intent or understanding as of *that* time. Moreover, it is not only controlled by the typed material in the Addendum (Civ. Code, § 1651), but this is the very debt that was restructured by the Guaranty Agreement. Although included as an historical exhibit in the Guaranty Agreement, it can not reasonably be read to contradict or detract from the specifically negotitated and contrary language of that *later* document.

[47] Respondents assert that Banco's prior relationship with the Kudsy companies demonstrated that "line of credit" agreements were routinely handled separately. This argument is at once irrelevant and factually inaccurate. First, how Banco may have dealt with some other customer with whom it had a long established relationship is of little assistance in evaluating this transaction and the specific documents involved. Second, the record reflects that the credit line arrangements with Kudsy were all handled as a part of the written documentation created to describe the agreement and understanding of the parties as to the extent of the credit to be advanced and the terms of repayment.

testified that he understood that any credit line agreement would have spelled out in writing (see fn. 12, *ante*).

The Guaranty Agreement before us purports to set forth and describe the entire debt relationship between Banco and Latian. It refers to a total remaining unpaid obligation, specifies the security therefore and describes just how that debt will be repaid. It is inconceivable that an additional agreement to extend further credit would not be provided for therein. That a bank, which has gone to such lengths to document an entire debt relationship, would make a cavalier oral commitment, such as is described in respondents' testimony, to provide further open-ended credit is an incredible proposition. This is especially true here, where even the respondents do not claim that their "oral discussions" with Banco involved (1) the terms of such credit extension, (2) the periods for which it would be extended, (3) the interest rates to be used, (4) any schedule of repayment or maturity dates and (5) the collateral which would secure the debt.

Contrary to the trial court, we have no trouble whatever concluding that a binding agreement for further credit would *not* have been "naturally separate" from the Guaranty Agreement, but indeed would have necessarily been an integral part thereof; if in fact agreed upon, such a significant commitment would most certainly have been included in the written Guaranty Agreement. This is particularly true here, where the contradiction of the oral agreement arises primarily from the fact that it was not included in the writing but stands apart, asserting the existence of a condition which is expressly denied by the writing.

(d) *The Trier of Fact Would Be Misled.* It seems obvious to us, given the circumstances and the carefully drafted language of the written agreement, that a trier of fact would be misled by the contradictory terms of the alleged oral agreement. Certainly, the jury in this case was misled by such evidence. Based upon respondents' testimony, which the jury apparently chose to believe, Banco's affirmative claims were rejected and respondents were

awarded substantial damages. Absent testimony as to such collateral oral agreement, the result would necessarily have been just the opposite.

(2) *The Written Agreement is Not Reasonably Susceptible to the Meaning Supplied by the Proferred Oral Agreement.*

Having concluded that the Guaranty Agreement was integrated, we turn next to the issue of whether the evidence of the alleged oral agreement is nonetheless admissible to explain the meaning of the written contractual language. "This aspect of the parol evidence rule was stated by the Supreme Court in *Pacific Gas & E.* v. *G. W. Thomas Dravage etc. Co.* [1968] 69 Cal.2d 33, 37: 'The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.' " (*Gerdlund* v. *Electronic Dispensers International, supra*, 190 Cal.App.3d at p. 272.)

In the interest of a complete and systematic analysis, it is necessary to address this issue; however, when, as here, the claimed oral agreement is a direct contradiction of the written instrument, it is clear that the issue has already been resolved.[48] In the presence of such a conflict, it is not possible to say that the written instrument is reasonably susceptible to the proposed new meaning of the parties' debt relationship which would be supplied by the parol evidence offered by repsondents. "Testimony of intention which is contrary to a contract's expressed terms . . . does not give meaning to the contract; rather it seeks to substitute a different meaning. It follows under the P.G. & E. case that such evidence must be excluded." (*Gerdlund* v. *Electronic Dispensers International, suprax00, 190 Cal.App.3d at p. 273; see also, Malmstrom* v. *Kaiser*

[48] As Code of Civil Procedure section 1856, subdivision (b), makes clear (see fn. 42, *ante.*), if the terms of the alleged collateral oral agreement were *consistent* with the writing, then the result might well be different.

Aluminum & Chemical Corp., supra, 187 Cal.App.3d at p. 316; *Blumenfeld* v. *R. H. Macy & Co.* (1979) 92 Cal.App.3d 38, 46; *American Nat. Ins. Co.* v. *Continental Parking Corp.* (1974) 42 Cal.App.3d 260, 264-265.)

Indeed, the respondents do not seriously make such a contention. They do not offer the oral agreement to explain or provide meaning to the written instrument. They offer it as a new, additional and completely different agreement.[49]

(3) *Admission of the Oral Agreement Can Not be Justified by Allegations of Promissory Fraud*

Our conclusion that evidence of the Oral agreement relied upon by respondents is inadmissible is not altered by respondents' attempt to characterize that agreement as a false promise. While it is true that a recognized exception to the parol evidence rule permits evidence of fraud in order to nullify the main agreement,[50] (2 Witkin, Cal. Evidence (3d ed. 1986) §§ 999, 1000, pp. 945-946), that rule has no application where " 'promissory fraud' is alleged, unless the false promise is independent of or consistent with the written instrument. [Citations.] It

[49] Thus, this case should be distinguished from those cases where it is claimed that some ambiguity exists which needs to be explained or clarified by extrinsic evidence (e.g., *Delta Dynamics, Inc.* v. *Arioto* (1968) 69 Cal.2d 525; *Continental Baking Co.* v. *Katz* (1968) 68 Cal.2d 512) or where the court had determined that there is a *necessary* missing term (e.g, *Consolidated Theatres, Inc.* v. *Theatrical State Employees Union* (1968) 69 Cal.2d 713). This case involves a purported oral agreement. There is no contention made here that the Guaranty Agreement is ambiguous or is some how susceptible of a different meaning than that which would ordinarily be attributed to the words used; nor is the collateral oral agreement advanced by respondents offered to prove any different meaning. Indeed, what respondents seek to prove is an entirely different agreement. Thus, the test of admissibility of extrinsic evidence articulated in *Pacific Gas & E. Co.* v. *G. W. Thomas Drayage, etc. Co.* (1968) 69 Cal.2d 33, 37 ("whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible") has no application here.

[50] Of course, respondents did not seek to "nullify" the loan agreement with Banco. To the contrary, they successfully pursued their contract remedies under the loan agreement and obtained a substantial damage and attorney's fee award.

does not apply where, as here, parol evidence is offered to show a fraudulent promise directly at variance with the terms of the written agreement. [Citations.]" (*Continental Airlines, Inc.* v. *McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 419; see also *Price* v. *Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 483-486.)

Over fifty years ago, our Supreme Court made a very defensible policy choice which favored the considerations underlying the parol evidence rule over those supporting a fraud cause of action. In *Bank of America etc. Assn.* v. *Pendergrass* (1935) 4 Cal.2d 258, the court rejected a debtor's attempt to avoid the clear terms of an unconditional promise to pay contained in a promissory note by the assertion of an oral agreement allegedly made by the bank that the obligation was in fact conditional. The court stated, "Our conception of the rule which permits parol evidence of fraud to establish the invalidity of the instrument is that it must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing." (*Id.*,p. 263)

Similarly, in *Bank of America* v. *Lamb Finance Co.* (1960) 179 Cal.App.2d 498, the court rejected a plaintiff's effort to avoid liability pursuant to the express written terms of a guaranty based upon alleged oral assertions by the bank that she would not have such liability. The court stated, "A distinction has been made by our courts in cases in which the fraud sought to be proved consists of a false promise. They have held that if, to induce one to enter into an agreement, a party makes an independent promise without intention of performing it, this separate false promise constitutes fraud which may be proven to nullify the main agreement; but if the false promise relates to the matter covered by the main agreement and contradicts or varies the terms thereof, any evidence of the false promise directly violates the parol evidence rule and is inadmissible." (*Id.,* at p. 502; see also, *Shyvers* v. *Mitchell* (1955) 133 Cal.App.2d 569, 573; *Cobbs* v. *Cobbs*

(1942) 53 Cal.App.2d 780, 783-785.)

While this rule has been subjected to some scholarly criticism,[51] we believe that the policy decision made by the court in *Pendergrass* is the better one. In explaining how a broad application of the concept of promissory fraud would undermine the policies of the parol evidence rule and encourage attempts to convert contractural disputes into fraud litigation, one court commented, "A broad doctrine of promissory fraud may allow parties to litigate disputes over the meaning of contract terms armed with an arsenal of tort remedies inappropriate to the resolution of commercial disputes." (*Price* v. *Wells Fargo Banco, supra* 213 Cal.App.3d at p. 485.) We concur with that view.

As we have concluded that the claimed oral "promise" of a $2 million line of credit is inconsistent with the written Guaranty Agreement, and is certainly not independent of it, respondents' claim of fraud with respect to this promise must also fail.[52]

c. *Conclusion*

We therefore conclude that the trial court erred in determining that the Guaranty Agreement was not integrated and in admitting the evidence regarding the inconsistent collateral oral agreement for a "$2 million line of credit." Such error was obviously prejudicial to Banco. Absent testimony about the collateral oral agreement, there was no evidentiary basis whatever for respondents to recover on their cross-complaint; in addition, such inadmissible evidence provided the only defense asserted by respondents to Banco's complaint.

We can not leave this disussion without a general comment. We do not share the concern expressed in some

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[51] See the discussion in *Price* v. *Wells Fargo Bank, supra,* 213 Cal.App.3d at pp. 483-486.

[52] For the same reason, respondents' argument that Evidence Code section 622 has no application is also without merit (see fn. 32, *ante*).

circles[53] that parties to a contract in California are not capable of drafting a written instrument which will fully and completely define a particular legal relationship. As we view it, it is the essence of the judicial function to contribute to legal certainty and reasonable predictability in the affairs of our citizens rather than to suggest that such goals are not attainable. Parties to a business or commercial transaction, such as those in this case, should be able to clearly express their intent as to the nature and scope of their legal relationship and then be able to rely on that expression. If, as in this case, they agree that their entire understanding is completely set forth in a particular writing then they are both entitled and required to live with the agreed terms. The courts simply can not permit clear and unambiguous integrated agreements, such as the one before us, to be rendered meaningless by the oral revisionist claims of a party who, at the end of the game, does not care for the result.

2. *Sufficiency of the Evidence*

As we address this second major issue, we are mindful of the special rules which are applicable. "[T]he scope of our review begins and ends with the determination whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support the conclusions reached by the jury. [Citations.] In reviewing the voluminous record, we must examine all factual matters in the light most favorable to the prevailing parties and resolve all conflicts in support of the judgment. [Citations.] [P.] 'Substantial' evidence, however, is not synonymous with 'any' evidence. To constitute sufficient substantiality to support the verdict, the evidence must be 'reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.' (*Estate of Teed* (1952)

[53] See, for example, the unfortunate and, in our view, inaccurate characterization of California law on this issue set out in *Trident Center* v. *Connecticut General Life Ins.* (9th Cir. 1988) 847 F.2d 564, 568-570. Compare, *FPI Development, Inc.* v. *Nakashima, supra,* 231 Cal.App.3d 367, 389-390. fn. 10.

112 Cal.App.2d 638, 644; [citations].)" *Kruse* v. *Bank of America* (1988) 202 Cal.App.3d 38, 51-52.) "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Edison Co.* v. *Labor Board* (1938) 305 U.S. 197, 229.). Improbable conclusions drawn in favor of a party litigant through the sanction of a jury's verdict will not be sustained where testimony is at variance with physical facts and repugnance is material and self evident. (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644.)

As we have already noted, our examination of this record fails to disclose sufficient evidence to support either the contract or fraud claims of the respondents. Each claim necessarily depends upon evidence which must be legally sufficient to support a conclusion that Banco made a binding commitment or promise to provide a $2 million line of credit.

The evidence produced in this case which respondents claim is sufficient consists almost entirely of (1) the disputed testimony of Amanollah and Manoucher that Stefanon and other Banco representatives had orally "promised" that a "$2 million line of credit" would be provided and (2) some superficial conflicts between the testimony of Stefanon at trial and some testimony given by him at his pre-trial deposition.[54] However, when the

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[54] For example, on cross-examination *at trial*, Stefanon testified:

"Q. As a matter of fact, it was your understanding, wasn't it, that Mr. Sarbaz was supposed to give his guarantee if the bank approved the line of credit?

"A. No.

"Q. And isn't it correct that if the bank did not approve the line of credit, you understood that he didn't have to give his guarantee?

"A. No."

Counsel for repondents then read the following testimony from Stefanon's pre-trial deposition:

"Q. But the idea was that if the bank approved the loan, then the Sarbazes would give their guarantees; is that it?

"MR. KREPS: By 'approved the loan,' you mean approve the line of credit?

Footnote 54 continued.

Footnote 54 continued.

"MR. ALIOTO: Yes, approve the line of credit.

"THE WITNESS: Yes, this was my understanding."

Counsel then engaged in an extended effort to get Stefanon to say whether such deposition testimony was true of false. An exchange followed which involved a series of argumentative questions put to Stefanon (during which, at one point, the trial judge admonished counsel to lower his voice) who stated that he could not answer "yes or no" to the question that an explanation was required. A review of this testimony in context reflects that Stephanon's *deposition testimony* was directed at Banco's approval of a loan (i.e., Latian's assumption of Kudsy's outstanding indebtedness) and, in that context, he agreed that the Amanollah's guaranty of the obligation depended on Banco's approval. At trial, on the other hand, Stefanon denied that Amanollah's guaranty depended on Banco's extension of a line of credit separate and apart from the credit extension involved in the assumption of *existing* debt. This was made clear by subsequent testimony where counsel read from the deposition and then asked some further questions:

"Q. BY MR. ALIOTO: (Reading [from Stefanon's deposition])

" 'Q. If the bank didn't approve the loan, the Sabazes weren't going to give a guarantee?

" 'A. This is speculation. I can not assure that they would not.

" 'Q. But that was your understanding wasn't it?

" 'A. Yes.' "

"Q. Did you give those answers to those questions?

"A. Yes.

"Q. Were they true of false?

"A. They were true.

"Q. The bank didn't approve the loan to the Sarbazes, did it?

"A. It approved.

"Q. It did?

"A. Yes. [P.] When the bank gave the permission to Sarbaz to take $1,533,000 for inventory, it is a loan. It is – it is finances to them. [P.] This doesn't mean that they have line of credit. Line of credit is completely different. It's not the one that you are mentioning there.

"Q. When you were giving the answers that you gave on this page, do you see what your counsel says (Reading)

" 'A. MR. KREPS:' Quote. 'By approve the loan, you mean approve the line of credit? [P.] MR. ALIOTO: Yes, approve the line of credit.' [P.] When you gave those answers – right after you said 'yes,' when you gave those answers, did you understand 'loan' to mean line of credit?

"A. Not the line of credit that we are talking about.

"Q. Some other line of credit?

"A. The line of credit was established on the joint venture of the

Footnote 54 continued.

evidence presented is examined in its entirety, and in context, the conclusion is inescapable that the evidence relied upon by respondents does not constitute the "substantial" proof required. It is only some evidence, but when examined in the context of the total case it is not "reasonable in nature, credible, [or] of solid value." (*Estate of Teed, supra,* 112 Cal.App.2d at p. 644.)

A review of the total record compels two major conclusions:

a. *Respondents' Version Was Neither Reasonable Nor Credible*

The express denials by Stefanon and all other Banco representatives who participated in the meetings of June 14, July 21 and August 25, 1982 were specific and consistent with each other as well as all of the documentation. They all testified that no oral commitment was ever made to provide the claimed line of credit. What was discussed at one or more of these meetings was the possibility that some credit extension, beyond approval of the Kudsy debt assumption, might be made available. However, that decision, as well as approval of the inventory transfer and debt assumption, would have to be made by Banco's head office. It could not be made by Stefanon alone, particularly

Footnote 54 continued.

proposal of the letter of July 21st."

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"Q. BY MR. ALIOTO: Again, the question is whether you gave these answers to these questions on page 100 of your deposition? Did you give them in terms of reference to the line of credit? [P.] And if you'd answer that, and then if you want to give an explanation, give one.

"A. Yes, the line of credit that I understood at that day was referring to the $1,534,000 that they were guaranteeing for the inventory they bought from the Kudsy Companies. [P.] Because all the line of credit will depend from the head office. [P.] It was explained clearly here, proved in writing, what we have done. [P.] I had no authority to give them any line of credit. And I assured them at the very beginning of the meeting that we had in the bank that any line of credit should have – be approved by the head office. That was clear. I had no authority to provide them, and I did not assure that they will have a line of credit provided by me. It was all head office that had to be decide. [sic.]"

in light of the fact that Latian was a new company and had no financial track record. These circumstances are consistent with common banking practices, especially when contrasted with respondents' version which requires one to believe that a bank officer, without receiving any information as to the borrower's financial condition or history, would (or could) commit his bank to an open-ended multi-million dollar obligation without discussion, much less agreement, as to terms such as interest rate, maturity dates, repayment schedule and security.

b. *The Contemporaneous Conduct of Respondents is Inconsistent With Their Version.*

(1) Respondents argue in their opening brief that the respondents, in investigating the Kudsy business, determined that the "most attractive aspect of the business was its $2 million revolving line of credit with Banco. The continued availability of the line of credit was a pre-requisite, absolutely essential to the Sarbaz family, for purchase of the business. Based on prior experience, they knew that without a line of credit, they could not operate an auto parts business successfully. Before acquiring the Kudsy companies they therefore needed to know that the $2 million line of credit would continue and be available to them." Yet, in spite of such claimed critical importance and in spite of their being at all times represented by counsel, there is not reference to the "$2 million line of credit" in any of the five offers submitted to Kudsy, or in any of their correspondence to Banco, or in the integrated Guaranty Agreement signed in January, 1983, which restructured the entire debt relationship. Indeed, three of those initial offers to the Kudsy companies, which were firm and in writing, were submitted by the respondents *before* ever once meeting with any Banco representatives;

(2) A majory extension of new credit would reasonably, if not obviously, require submission of written financial statements justifying it. In spite of this, the record demonstrates without dispute that neither the respondents nor Latian submitted any timely financial statements to Banco. The unaudited financial statements

which were submitted were not even prepared until February 1983 and, according to Stefanon, not in fact delivered until April 15, 1983, nearly eight months after the purchase transaction closed and three months after the debt restructure documents were drafted, approved and signed. The only financial information which had been provided was oral, in spite of repeated requests from Stefanon and Banco; and even that information contained materially false statements regarding the state of Latian's contributed paid-in capital. If, as the respondents now claim, the extension of substantial credit to a brand new corporation was so "critical" to their decision to go forward with this transaction, such conduct is inexplicable.

(3) The respondents admit that the "line of credit" which they sought was the credit line enjoyed by the Kudsy companies. When the negotiations started that was slightly in excess of $2 million. However, as of July 7, 1982, when the purchase contract was originally agreed to, all but $150,000 had already been extended and was due and payable by December 31, 1982. Thus, even under the respondents' own view of the matter, as of the date they entered into the contract to acquire the Kudsy inventory by assuming the debt obligations due thereon they could not have received more than $150,000 in additional "credit line" without making debt reduction

payments to Banco;[55]

(4) In January of 1983, after Banco had failed, in the eyes of the respondents, for nearly six months to provide the "promised" line of credit, they signed the Guaranty Agreement in which they knowingly and expressly acknowledged that their obligations to Banco, as described in that agreement, were *unconditional*. That agreement contained no reference to any line of credit for Latian and contained a clear integration clause.

This court, in viewing the whole record through the prism of a search for evidence which is "reasonable in nature" must look at the transaction as a whole. Does the self-serving claim of the respondents make any sense? Would a bank which has so meticulously documented every aspect of a transaction commit itself orally and so casually to such an important obligation? We think not. Banks simply do not do business that way. Not only is the evidence offered by the respondents insubstantial and unreasonable, it defies belief. It is not solid, credible or reasonable and cannot support the conclusion that Stefanon ever made a commitment to, or that Banco ever intended to promise, a "$2 million line of credit" to Latian.

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[55] These circumastances also illustrate another defect in the argument that an enforceable oral contract exists. When pressed as to what terms their promised "$2 million line of credit" would have, the respondents said that it was to be the same as that enjoyed by Kudsy. Given that Kudsy's line was subject to withdrawal or termination at any time and, in the event, required a pay off of the existing balances by December 31, 1982, it appears that the respondents' claimed commitment from Banco was too vague and indefinite to be enforced. At most, what respondents rely upon here was an unenforeable agreement to agree (or more likely negotiate) in the future. This is clearly insufficient. (*Kruse* v. *Bank of America, supra*, 202 Cal.App.3d at pp. 59-60; *Laks* v. *Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 892.) Before such a promise could be enforeable there would have to be agreement on interest rate (Latian's credit rating might or might not warrant the same rate enjoyed by Kudsy), method and schedule of repayment and maturity dates. Even the respondents do not claim that there was any discussion, much less agreement, on any of these points.

3. *There Was Not Sufficient Evidence to Establish Fraudulent Conduct*

The remaining claim of fraud is, if anything even more specious than the contract claim. Our search of this record reflects no evidence whatever of any fraudulent misconduct on the part of either Banco of Stefanon. Respondents rely entirely on tortured construction of documents improperly translated from Portugese to English, unreasonable inferences from otherwise undisputed events and creative (and apparently charismatic) argument.[56]

In order to recover for fraud it was necessary for respondents to prove that (1) Banco and/or Stefanon had made a misrepresentation (including a "promise" made without the intent to perform), (2) knowledge of the representation's falsity, (3) an intent to defraud, i.e., to induce reliance, (4) justifiable reliance on their part and (5) resulting damage. (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 676, p. 778.) Although Banco emphasizes in its brief the absence of evidence of justifiable reliance (since the respondents contractually committed themselves to purchase the Kudsy inventory based on their own investigation of Kudsy and the business), we believe that there was not evidence whatever of any false representation by Banco or Stefanon and certainly there was no solid or credible evidence of an intent to defraud.

The respondents claim that there were two basic misrepresentations; (1) Stefanon's false promise that a $2

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[56] A case in point is respondents' argument concerning the "strategy" which they claim was formulated by Stefanon and Banco to induce the respondents to "rescue" Banco from the consequences of a bad loan to Kudsy. Other thatn Stefanon's use of the word "strategy" in a communication to Banco, there is absolutely no evidence whatever of any plan to entice the respondents into assuming the Kusdy debt or taking over their business. As we have repeatedly noted, that was entirely respondents' idea. The communciations upon which respondents rely reflect nothing more than efforts by Stefanson to process Latian's credit application under circumstances where the deal kept changing and the respondents failed to provide timely or adequate financial information.

million line of credit would be provided; and (2) Stefanon's false statements regarding the good financial condition of Kudsy.[57] We have already disposed of the first of these. We will now discuss the second.

It is clear from this record that there was nothing false about the statements Stefanon may have made about Kudsy's history with Banco. Kudsy had a long history with Banco and, indeed, a credit line for $2.1 million had been approved in early 1982, of which Kudsy had actually utilized over $1.8 million by the time of its negotiations and contracting with the respondents. No evidence was offered to show that the history of the relationship between Kudsy and Banco, up until July 7, 1982, was not entirely as allegedly represented, or in any way different from what the respondents had discovered through their own independent investigation which had been completed by that time.

The record is undisputed that the respondents fully investigated Kudsy before entering into the original July 7, 1982 contract. That is why the respondents decided to buy assets rather than capital stock. In addition, the respondents even renegotiated the deal prior to the August

[57] Amanollah, apparently was the only one to describe the claimed misrepresentations purportedly made by Stefanon on behalf of Banco. He described a meeting at Banco's offices which was *before* the purchase was made which necessarily means it was the first meeting he had with Stefanon, on June 14, 1982. Respondents in their brief contend that this was the date when the claimed representations were made:

"Q. By Mr. Shulman: What question did you ask Mr. Stefanon about the Kudsy Company?

"A. I said, 'Mr. Stefanon, if this company – if this company is a good company, that I would purchase that company, and that we would pay you gradually.'

"Q. By Mr. Shulman: What did Mr. Stefanon say after you said this to him?

"A. He said it was a very good business and that these people are honorable people. [P.] And he said with respect to the $2 million line of credit, that we would have access to that line of credit."

At oral argument, respondents concede that this was the only evidence of the claimed misrepresentation by Stefanon or Banco.

25, 1982 closing in order to insure that it purchased only the most marketable of the Kudsy inventory. Finally, the way the respondents structured their purchase agreement, the financial condition of Kudsy was of no significance to them. They took possession of the inventory they wanted and only owed Banco those obligations which were related to and secured by that inventory. If Kudsy failed to pay its portion of the Banco debt, that would harm Banco but not the respondents. This is a makeweight claim with no substance. Moreover, Banco's argument that, in any event, given the independent investigation conducted by the respondents, there was no justifiable reliance, is certainly well taken. (*Kruse* v. *Bank of America, supra,* 202 Cal.App.3d at p. 54; *Seeger* v. *Odell* (1941) 18 Cal.2d 409, 415.)

CONCLUSION

The evidence presented to the jury regarding Banco's alleged promise or commitment to provide Latian with a line of credit should not have been admitted. Even if properly received, it was not sufficient, when considered in the context of the whole record, to meet the standard of substantial evidence with respect to both the contract and fraud claims. Therefore, the judgment against Banco must be reversed. In addition, as the assertion of this claim was the only defense offered by Latian and Amanollah,[58] with respect to the first three causes of action in Banco's complaint,[59] Banco is entitled to

[58] When asked at trial why he had not paid Banco the money it claimed, Amanollah answered, "Because of the fact that the Bank of Brazil, or Banco do Brasil, did not honor its promise to grant a $2 million line of credit." A little later he was asked why he had stopped making payments to Banco in December 1983 and he said, "Because they had not honored their line of credit. They had not honored their promise. And we decided not to pay them anymore."

There was no other contention made in the evidence or the pleadings; nor was there any dispute that the sums claimed were in fact unpaid and otherwise due and owing.

[59] Banco had also included a cause of action for fraud. However, the record reflects that it has abandoned that claim.

judgment thereon. (Code Civ. Proc., § 629.)[60]

DISPOSITION

The judgment in favor of respondents on Banco's complaint and on their cross-complaint is reversed. The matter is remanded to the trial court with directions to enter judgment in favor of Banco (1) on the first three causes of action of its complaint and (2) on respondents' cross-complaint and to conduct such further proceedings in connection therewith

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as may be appropriate. Banco and Stefanon shall recover their costs on appeal.

CERTIFIED FOR PUBLICATION.

CROSKEY, J.

We concur:

KLEIN, P.J.

DANIELSON, J.

---

[60] Banco also appealed from the trial court's denial of its motion for a judgment notwithstanding the verdict. For the reason set out herein, that motion should have been granted.

CERTIFIED FOR PUBLICATION
NO CHANGE IN JUDGMENT

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BANCO DO BRASIL, S.A., etc., et al., *Plaintiffs, Cross-Defendants and Appellants,*	)	**B045477 (Super.Ct.No. C532005)**
v.	)	**ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING**
LATIAN, INC., etc., et al., *Defendants, Cross-Complainants and Respondents.*	)	

THE COURT:

It is ordered that the opinion filed herein on September 27, 1991, be modified as follows:

On page 30, line 3 of footnote 34, after the word "Latian;" add the following:

> the interest rate provided for in the note was at the reduced rate 13% of per annum;

Upon such modification of the opinion, the petition for rehearing is denied.

There is no change in the judgment.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 3 DATE: 10/25/91

Second Appellate District, Division Three,
No. B045477
S023696

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

BANCO DO BRASIL S.A. ETC. Et. Al., Appellants

v.

LATIAN INC. ETC. Et Al., Respondents

Respondents' petition for review DENIED.

SUPREME COURT
FILED
JAN 23 1992
Robert Wandruff Clerk
DEPUTY

LUCAS
Chief Justice

SYNOPSIS OF THE EVIDENCE

Beginning in May of 1982, the Sarbaz family made a series of offers to purchase assets of the Kudsy Companies. Each of the offers provided for partial payment of the purchase price by assumption of the Kudsy debt to Banco under the line of credit; and each offer was expressly conditioned upon "obtaining any and all consents required under the terms of any contract, lease or franchise," including consent by Banco to continue and transfer the line of credit. PX 9, 13-17; RT 922-24, 927-29, 934-35, 937-38, 939. Without promises and assurances that the $2 million line of credit would be available to Latian, the Sarbaz family would never have proceeded with the Kudsy acquisition, the assumption of the Kudsy indebtedness, and repayment of that debt to Banco. Both Amanollah Sarbaz and his son, Manoucher, so testified at trial. RT 588-89, 614, 627, 702, 816. Indeed, even Stefanon acknowledged the materiality of a line of credit, both in his internal memoranda to his superiors in Brazil, and in his testimony at trial. DX M, DX 58, DX J, DX I; RT 1371-72, 1381-83, 1391-92 (concerning PX 49), 1427-28, 1440-41. Banco well knew that without the line of credit, there would be no acquisition. RT 1287-92, 1381-83, 1384, 1385, 1388, 1427-28.

Stefanon admitted that he told the Sarbaz family that Banco would continue the line of credit if the Sarbaz family bought the Kudsy business.

> Q. BY MR. ALIOTO: Who told you -- who asked you whether there would be continued assistance by the bank?
>
> MR. KREPS: Asked and answered.
>
> THE COURT: Overruled.
>
> A. Mr. Koudsi, Mr. Antoci, Amanollah Sarbaz, Manoucher Sarbaz.
>
> Q. All right.
>
> Did they ask you in sum or substance will the line of

credit continue?

A. Yes.

Q. And you told them it would?

A. Yes.

RT 1381. The testimony of Amanollah and Manoucher Sarbaz is substantially to the same effect.

Banco contended that Stefanon qualified or attached conditions to any representations by stating that he lacked authority to grant the line of credit and that any decision would have to be made by the home office in Brazil. The Sarbazes, however, testified that Stefanon said only that he would be advising the home office in Brazil about the line of credit, that the notification of the home office would be no problem and was a mere formality, and that the Sarbazes could count on receiving the line of credit. RT 536-38, 945-46; PX 69, pp. 103-05. Moreover, regardless of how Stefanon phrased the matter of home office approval, Banco represented to the Sarbazes at the August 25, 1982 closing that the complete transaction had been approved, as set forth more fully hereafter.

At the closing, in reliance on the bank's representations, Latian purchased the Kudsy business and assumed the indebtedness to Banco. PX 39; RT 493-94, 494-95, 499-500, 577, 588-89, 590-91, 599, 614, 627, 816. On September 8, 1982, as agreed, Latian delivered a check to Banco for $310,000. PX 52. On September 10, 1982, Banco deposited the check in an escrow account. PX 52; RT 1308-09, 1326-27, 1331-33. The parties had agreed that the payments were to be held in a separate "side account" or escrow, until Banco provided final approval for the transfer of the $2 million line of credit to Latian. RT 496-99, 590-91, 618, 620-22, 946-47, 950, 1301-02, 1306-09, 1314-16, 1319-22, 1325-26, 1409.[1] On September 17, 1982, Stefanon told the

[1] In his deposition , Stefanon testified exactly to these facts. When confronted with this testimony at trial, however, Stefanon gave a performance that can be described only as extraordinary, by telling the jury that his previous answers should be changed from "yes" to "no" and form "true" to "false." RT 1306-07, 1308-09, 1314-16, 1319-22, 1325-26.

home office in Brazil to suspend consideration of any line of credit for Latian. RT 1331-33, 1334-35, 1340. On September 22, 1982, Banco simply took the $310,000 from the account and applied it to the Kudsy debt.

Latian and Amanollah Sarbaz later entered into a Guaranty Payment Agreement with Banco, in which they guaranteed the remaining debt of the Kudsy companies to Banco. PX 1, 32, 33, 34; RT 501-02. This is the document on which Banco originally commenced this lawsuit. Significantly, the new agreement incorporated by reference the Security Agreement of September 27, 1982 and attached schedules, with their repeated references to the line of credit. PX 1. When Amanollah Sarbaz signed the new agreement, he understood that he was "including the prior agreement with the bank that made reference to the line of credit." RT 607-08

On January 19, 1983, Stefanon's superiors in Brazil stated "that they agreed with the reschedule of the payment but they didn't approve the line of credit." RT 1243, 1245, 1444. Thus, as of January 19, 1983, Stefanon knew Latian would not be getting the $2 million line of credit. RT 1444. Nonetheless, immediately upon receiving the news, Stefanon instructed the bank's outside counsel to forward to Latian the new guaranty agreement backdated to January 1. RT 1243-45, 1250, 1444, 1619, 1638-39; DX C, PX 32, 33. Acting on Stefanon's instructions, Banco's lawyers forwarded the new guaranty agreement to Latian on January 20, 1983. PX 32 The letter of transmittal made no mention of Banco's having denied Latian's application for a line of credit. PX 32. Oblivious of these circumstances, and in fact believing the contrary, Latian signed the new agreement.

Thereafter, Latian made two monthly payments of $50,000 each of principal and interest, and eight monthly payments of $12,000 each of interest to Banco--a total of roughly an additional $200,000. RT 418, 426, 456, 512-14, 608, 611.

Finally, in December of 1983, Latian stopped making

interest payments, because Banco had still not provided the line of credit. RT 523-25. Latian then met with Stefanon and offered Banco three options: first, provide the $2 million line of credit; second, retain the guarantees from Latian and Amanollah Sarbaz, but release Banco's security interest, so that Latian could obtain a line of credit from another lender; or, third, foreclose on the security and take Latian's inventory in satisfaction of the Kudsy debt. RT 523-26. Banco accepted none of the three alternatives. RT 525-26.

Supreme Court, U.S.
FILED
MAY 22 1992
OFFICE OF THE CLERK

(2)

No. 91-1694

In The

Supreme Court of the United States

October Term, 1991

LATIAN, INC. and AMANOLLAH SARBAZ,

Petitioners,

v.

BANCO DO BRASIL, S.A. and JOAO STEFANON,

Respondents.

Petition For Writ Of Certiorari
To The Court Of Appeal Of The State of California
Second Appellate District
Division Three

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS BELOW AND LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES.

The parties to the proceedings below were as follows: Banco do Brasil, S.A., Los Angeles Agency, an agency organized and existing under the laws of the State of California of a banking organization organized and existing under the laws of the Federation Republic of Brazil, was plaintiff and cross-defendant in the trial court. Joao Stefanon, an individual, was also a cross-defendant.

Latian, Inc., a California corporation, and Amanollah Sarbaz, an individual, were defendants and cross-complainants.

In the Court of Appeal for the State of California, Banco do Brasil and Joao Stefanon were appellants; Latian, Inc. and Amanollah Sarbaz were respondents and cross-appellants.

Pursuant to Rule 29.1, petitioner Latian, Inc. represented in its Petition that it has no parent companies, subsidiaries, or affiliates.

Pursuant to Rule 29.1, respondent Banco do Brasil lists the following partially owned subsidiaries:

(i) Companhia Acos Especiais Itabira (ACESITA)

(ii) Acesita Energetica S.A.

(iii) Forjas Acesita S.A.

(iv) Computadores e Sistemas Brasileiros S.A. (COBRA)

(v) Eurobaz Limited

(vi) Banco Brasileiro Iraquiano S.A.

Respondent Banco do Brasil has no parent companies or other affiliates.

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JURISDICTION

Petitioners Latian and Sarbaz claim that the jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257. As is more fully set out below, in the Summary of Argument, a substantial federal question does not exist in this case as to invoke this Court's jurisdiction. Furthermore, the final judgment on this matter was based on adequate state grounds.

STATEMENT OF THE CASE

Procedural History

Respondent Banco do Brasil ("Banco") commenced this action in California state court against petitioners Latian, Inc. ("Latian") and Amanollah Sarbaz ("Sarbaz") on January 28, 1985 seeking to recover sums due and unpaid under a January 1983 Guaranty Payment Agreement and three promissory notes dated June 28, 1983, December 6, 1983 and December 31, 1983. Petitioners Latian and Sarbaz, filed a cross-complaint against Banco and respondent Joao Stefanon ("Stefanon") claiming fraud and breach of contract based on the alleged failure of Banco to honor an oral commitment to provide them with an additional $2 million line of credit.

Trial commenced on June 12, 1989 before a jury in California Superior Court, County of Los Angeles. On July 12, 1989, the jury, in a ten-two split of opinion, returned a verdict against Banco on two of Latian's counter-claims. The jury awarded Latian and Sarbaz $1.9 million in damages for fraud against Banco and Stefanon,

$3.6 million for breach of contract against Banco, and $22 million in punitive damages against Banco. There was also an award against Stefanon for $2.4 million in punitive damages, later reduced to $500,000. Judgment was entered July 12, 1989.

Shortly after the verdict, the Trial Judge, Judge Billy Mills, suffered a disabling stroke. The case was turned over to the presiding judge, who subsequently referred it to the Honorable Richard Lavine, to hear all post-trial motions. Because complete transcripts of the trial were not available and Judge Lavine was not present at the trial, his rulings were necessarily made without the benefit of a review of the evidence. On post trial motions, Judge Lavine remitted the punitive damages against Banco to $5 million and against Stefanon to $5.

Banco and Stefanon timely filed their Notice of Appeal to the Court of Appeal, State of California, Second Appellate District, Division Three. On appeal, the state appellate court reversed the judgment in its entirety and remanded with instructions to enter judgment in favor of Banco, based upon the appellate court's finding that (a) the petitioners' entire case rested upon their claims that there was an extrinsic oral agreement for the Bank to give them a $2 million line of credit and that such claims were barred by the parol evidence rule as a matter of law, and (b) the record showed that petitioners failed to present "substantial evidence" to support their claims that the Bank made and breached an oral agreement to give petitioners a $2 million line of credit. The Order of the Court of Appeal was issued on September 27, 1991.

Thereafter, petitioners Latian and Sarbaz sought rehearing before the California Court of Appeal and were

denied by Order issued October 25, 1991. They also sought review in the Supreme Court of California even though no grounds for review existed according to Rule 29 of the California Rules of Court.

Accordingly, the California Supreme Court denied review *en banc*, without opinion by Order issued January 23, 1992.

Factual Background[1]

Respondents incorporate by reference herein the complete section entitled "Factual Background" from the Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, entered September 27, 1991 and reported as *Banco do Brasil v. Latian, Inc.*, 234 Cal. App.3d 973, 285 Cal. Rptr. 870 (1991). A copy of that Opinion is attached as Appendix A to petitioners' Petition for Writ of Certiorari at pages A-1 to A-53.

Basis of Federal Question

Petitioners claim at page 2 of their petition that the federal question in this case arose when the California Court of Appeal issued its Order reversing the lower court's judgment. In particular, petitioners claim that the federal question arose from the following statement in the Opinion issued by the Court of Appeal at p. A-49:

---

[1] A respondent may incorporate by reference the statement of the facts in the opinion below. Stern & Gressman, *Supreme Court Practice*, 6 ed., section 6.37, p. 390.

> This court, in viewing the whole record through the prism of a search for evidence which is "reasonable in nature" must look at the transaction as a whole. Does the self-serving claim of the respondents make any sense? Would a bank which has so meticulously documented every aspect of a transaction commit itself orally and so casually to such an important obligation? We think not. **Banks simply do not do business that way.** Not only is the evidence offered by the respondents insubstantial and unreasonable, it defies belief. It is not solid, credible or reasonable and cannot support the conclusion that Stefanon ever made a commitment to, or that Banco ever intended to promise, a "$2 million line of credit" to Latian. (Emphasis added to sentence taken out of context by petitioners as the entire basis of their claim that a federal question arose.)

SUMMARY OF ARGUMENT OPPOSING CERTIORARI

1. Petitioners have no standing to seek review by this Court or to invoke the jurisdiction of this Court because the Seventh Amendment does not apply to state civil trials, as in the contract action below;

2. Petitioners' purported "federal question" argument based on the Seventh and Fourteenth Amendments was not properly raised or decided at the state court level. Therefore, petitioners have no basis to invoke the jurisdiction of this Court;

3. Petitioners' purported "federal question" argument should not be reviewed because the state Court of

Appeal decided this case based on two alternative adequate state grounds. The primary basis for its decision was a legal determination that petitioners' only evidence supporting their verdict should have been excluded under California contract law which prohibits the use of parol evidence to contradict a written instrument. The second basis for its decision was that the record showed that petitioners failed to present "substantial evidence" to support their claims that the Bank made and breached an oral agreement to give petitioners a $2 million line of credit.

4. Petitioners failed to present any "special and important reasons" for this Court to grant review. Specifically, petitioners have failed to argue that either of the procedures actually used by the state appellate court to reverse the trial verdict in any way violated their "due process" rights or threatened the rights of any other litigants; or that said procedures conflicted with any applicable Supreme Court decision.

REASONS FOR DENYING THE WRIT

I. LATIAN'S PETITION SHOWS ABSOLUTELY NO BASIS FOR INVOKING THE JURISDICTION OF THIS COURT.

Petitioners assert that this Court has jurisdiction over this matter pursuant to 28 USC Sec. 1257(3). Because the underlying case plainly involved neither the validity of a United States statute or treaty, nor a state statute, petitioners argue that this Court should review their writ of certiorari based solely on the last jurisdictional ground

stated under Sec. 1257(3), i.e., that this writ presents a "right, privilege or immunity . . . specially set up or claimed under the Constitution" of the United States. In sum, petitioners contend (1) that the California Court of Appeal reversed a jury verdict "based entirely on its disagreement with the factual findings of the jury and the trial court" and (2) that this reversal therefore violated petitioners' right to a jury trial under the Seventh Amendment to the U.S. Constitution.

Petitioners' first assertion is a flagrant distortion of the appellate decision, which was plainly based on two separate and well-supported state grounds. However, this Court need not even look to the underlying decision to deny this writ. As shown below, the purported "federal question" now raised by petitioners exposes their complete lack of standing or any basis to invoke the jurisdiction of this Court. Indeed, the only question for this Court to consider now is whether to sanction petitioners for submitting a frivolous petition and deliberately misleading this Court to try to obtain review.

A. Because The Seventh Amendment Clearly Does Not Apply To State Civil Trials, Petitioners Have No Standing To Request Review By This Court.

The same argument petitioners offer to try to obtain this Court's review shows that they are not entitled to it, and ends this issue where it begins. Simply put, the California Court of Appeal could not have denied petitioners their "constitutional rights" under the Seventh Amendment because petitioners plainly had no such

rights. The obvious reason is that the Seventh Amendment *does not apply to state civil jury trials.* Therefore, petitioners have absolutely no standing to seek review by this Court, and their petition must be denied.

The Seventh Amendment guarantee of a jury trial in civil cases was not an element of due process applicable to state courts through the Fourteenth Amendment. *O'Connor v. State of Nevada,* D.C. Nev. 1981, 507 F.Supp. 546, 548, affirmed 686 F.2d 749, certiorari denied 459 U.S. 1071. Consequently, a litigant in a state court civil action has no constitutional right to trial by jury under the Seventh Amendment or under the due process clause of the Fourteenth Amendment. *Iacaponi v. New Amsterdam Cas. Co.,* D.D. Pa. 1966, 258 F.Supp. 880, 884, affirmed 379 F.2d 311, cert. denied 88 S.Ct. 802. See also, e.g., *Sealey By and Through Sealey v. Hicks,* Or. 1990, 309 Or. 387, cert. denied, 111 S.Ct. 65 (The Seventh Amendment right to jury trial does not apply to the states).

Thus, contrary to petitioners' unfounded statement on page 7 of their petition, this Court has *never* enforced the second clause of the Seventh Amendment in any *state civil* action, and has uniformly rejected any petition for certiorari arising from the alleged denial of jury trials in state civil actions.[2] Similarly, the appellate decision below, even if it bore the slightest resemblance to the

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[2] Respondents note that petitioners' sole cited "authority", a section of a Wisconsin Law Review article, discusses only *federal cases,* for the very reason that they are the only ones subject to the Seventh Amendment. (Indeed, the title of this article is "Appellate Review of *Federal* Civil Jury Verdicts").

"straw man" version concocted by petitioners, could not "erode the constitutional guarantees enjoyed by the American people" (Petition, p. 6) because no such guarantee has ever been offered in state civil trials. Moreover, were this Court concerned over the alleged runaway "practice of appellate judges imposing their views as a substitute for the evidence" (Petition, p. 8), it obviously should select for review a case in which the Seventh Amendment applies, i.e., a federal or state criminal case.[3]

Finally, this Court should note that petitioners have never attempted to argue that the above law is incorrect, or that the Seventh Amendment *should* be incorporated by the Fourteenth Amendment and applied to state civil actions. Rather, they have simply assumed, quite incorrectly, that the Seventh Amendment does govern such actions, and argued only that they were denied their Seventh Amendment "rights". Because such rights plainly never existed, this petition should be rejected out of hand. Accordingly, this Court need read no further.

B. Because Petitioners Failed To Raise A Substantial Federal Question In The State Court Proceedings, This Court Has No Jurisdiction To Review This Matter.

Petitioners have newly crafted their purported constitutional arguments for the first time in the instant

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[3] Petitioners' cited law journal shows that the Court has been presented with numerous opportunities to review federal cases that are both subject to the Seventh Amendment and arguably infringe upon it, and that the Court has consistently denied review of these otherwise "eligible" cases.

petition, only after the California Supreme Court rejected their arguments below solely on state law. Therefore, this Court has no jurisdiction to consider them now.

It is essential to the jurisdiction of the Supreme Court under Sec. 1257 that a substantial federal question has been properly raised in the state court proceedings. Stern & Gressman, *Supreme Court Practice*, 6th Ed., section 3.25, p. 208. Litigants who seek to bring cases to the United States Supreme Court from state courts must present federal issues first in the state court systems, not only as a matter of comity, but in order to afford parties the opportunity to develop the record necessary for adjudicating the issue and to permit the state courts to exercise their authority to construe state statutes so as to avoid or obviate federal constitutional challenges. *Webb v. Webb*, 451 U.S. 493 (1981). This also permits the state court to identify independent and adequate state grounds that would moot the federal issue. *Id.*

It is well established that the Supreme Court is vested with no jurisdiction unless a federal question was raised *and* decided in the state court below. *Crowell v. Randell*, 35 U.S. 368 (1836); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). As Justice Harlan stated in a dissent, "The rule that in cases coming from state courts this court may review only those issues which were presented to the state court is not discretionary but jurisdictional", *Amalgamated Food Employees Union v. Logan Valley Placer*, 391 U.S. 308, 334 (1963). Moreover, a federal question must be properly framed, raised, presented and pursued in a timely and proper manner at the appropriate point or points in the state court proceedings. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962).

It is clear that in the instant matter neither the Court of Appeal nor the California Supreme Court ever entertained or decided the Seventh Amendment issue petitioners are now raising, primarily because petitioners never properly raised this issue before any state court at any level. Although petitioners claim they first argued this issue in their petition for rehearing before the Court of Appeal, the record completely rebuts this assertion. A copy of this petition for rehearing is attached hereto to the Appendix ("App.") as A-1 to A-35 to this Opposition. It shows that petitioners argued five distinct grounds for reconsideration by the Court of Appeal (See, e.g., Table of Contents at App. A-2). Not one of these arguments was based on, involved or even mentioned the Seventh Amendment or Fourteenth Amendment. Indeed, the only reference to the Seventh Amendment (which petitioners quote in their instant Petition, p. 2) appears solely in the Conclusion to that petition for rehearing (App. A-34), not as a properly framed argument, but merely as part of a spiteful and rambling "parting shot", chastising the Court of Appeal for its decision reversing the verdict.

More important is the fact that petitioners did not properly raise this constitutional issue in their subsequent petition to the California Supreme Court, the "highest state court". A copy of the petition to the California Supreme Court is attached hereto to the Appendix ("App.") as B-1 to B-28. For a "federal question" to be properly subject to review by the U.S. Supreme Court, it must first have been pursued in the state court in the manner and with the degree of specificity required by the state rules of practice. See *Beck v. Washington, supra.*

Failure of a party to follow the appellate channels and procedures required by the state will be deemed a waiver of the federal issue and there will be no basis for the assertion of the Supreme Court's jurisdiction. *Herndon v. Georgia,* 295 U.S. 441, 443 (1935). See also *Beck v. Washington, supra,* at 553 (A litigant waived the federal issue by failing to list it among the "assignment of errors" in its brief to the state supreme court, or to argue the point in that brief, but instead merely mentioned it in one sentence of its brief).

In the instant case, California Rule of Court 28(e)(2) expressly required petitioners to state, at the "beginning of the body of the petition", *all issues presented for review* by the California Supreme Court. Petitioners listed only four specific issues, none of which cited or referred to the Seventh Amendment or any other federal issue. (See, e.g. Table of Contents at App. B-2) Because petitioners undeniably failed to raise the instant "federal question" in their petition before the highest state court in accordance with its own rules, they cannot raise it now before this Court.

Petitioners try to dodge this fatal bullet by pointing to a generic passing reference to "denial" of its "rights to due process" bandied about in their *Reply* to Banco's brief opposing their petition to the California Supreme Court. (App. C-7) This is grasping at short straws. A copy of the *Reply* in support of the petition to the California Supreme Court is attached hereto to the Appendix ("App.") as C-1 to C-14. First, even the most generous interpretation of this vague, random and general language leaves it well short of a properly framed federal question. Second, even a properly framed federal question cannot be raised in a

"reply brief" as a matter of California law. Under California Rules of Court, Rule 28(e)(2), it *must* be raised in the *petition* in the manner stated above. Finally, the California Rules of Court do not even allow "reply briefs" to be filed by petitioners, *unless* the respondents expressly raised additional specified "counter issues" in its brief. California Rules of Court, Rule 28(d). Respondents unquestionably did not. Therefore, this sole purported basis of "federal question" jurisdiction is not only plainly inadequate, it was a complete violation of the state rules in every respect.

II. THE STATE APPELLATE COURT DID NOT REVERSE THE JURY VERDICT BASED ON ITS COLLECTIVE "VIEW OF THE WORLD", BUT ON TWO INDEPENDENT AND WELL-SUPPORTED STATE GROUNDS.

A. Petitioners Have Completely Distorted The Basis Of The Appellate Court's Decision In An Ill-Considered Effort To Obtain Review.

Petitioners have resorted to a transparent distortion of the appellate decision to try to extract a constitutional issue from it. Petitioners' repeated contention that the appellate court based its decision solely on its "views" about "how Banks do business" is not only false, it is a contemptible effort to deceive this Court and should subject petitioners to appropriate sanctions. Moreover, it fails to obscure the undeniable fact that the appellate court fully decided this matter on adequate state grounds, thereby barring review.

The Supreme Court has consistently adhered to the principle that it will not review a state court judgment

based upon an adequate and independent nonfederal or state ground, even though a federal question be involved and perhaps wrongly decided. *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908). Here, the Court of Appeal expressly based its decision on *two* alternative state grounds, each of which was independently sufficient to support the reversal, and neither of which relied on the appellate court's subjective "views of the world". Supported by a uniquely thorough 70 page opinion, the appellate court based its reversal first and foremost on the well-established California rule excluding use of parol evidence to contradict an express written agreement. (See Appendix to Petition, hereinafter "Pet.App.", Pet.App. A-1 to A-53.) The appellate court then reinforced this decision by also finding that petitioners failed to present "substantial evidence", in accordance with California's applicable legal standard, to support their claims of an oral side agreement for a $2 million loan. (See Pet.App. A-43 to A-52.) Should this Court wish further elucidation of these two findings, respondents discuss each of them more thoroughly below.

Reason One – Petitioners' Oral Testimony Was Barred By California's Parol Evidence Rule

In sum, petitioners' sole evidence supporting their verdict was their own oral testimony that the Bank had made and breached an oral "side agreement" to lend them $2 million, even though this was never mentioned in the loan and guaranty agreements signed by petitioners and which expressly superseded any oral agreements. After meticulously analyzing petitioners' contention against all of the established state legal tests

and criteria, as well as the important state policy considerations intended to prevent fraud and support the sanctity and certainty of contracts, the California Court of Appeal easily concluded that the written loan agreements were "integrated" and that petitioners' parol evidence should not have been admitted by the trial court. (Pet.App. A-42.)

Even though the Court of Appeal devoted 22 pages of its opinion to the parol evidence issue and explicitly reversed the verdict on this legal determination alone, before even addressing the "sufficiency of evidence" (see Pet.App. A-26 to A-43), petitioners chose to bury this dispositive fact in a footnote to their petition. (Petition, footnote 4, at pps. 4-5.) They reluctantly admit, as an aside in footnote 4 of their Petition that "the Court of Appeal also made an alternative ruling based on the parol evidence rule." (Petition, footnote 4, at pps. 4-5.) However, they neglected to state that this "alternative ruling" was independently dispositive of the case. (See Pet.App. A-26 to A-43.) Moreover, their misdirected effort to dismiss this exhaustively supported ruling as being "infected" with the Court's "own opinion" is breathtaking in its audacity. Petitioners fail to cite even one word from the appellate decision to support this charge. Conversely, the Opinion shows that this ruling was based solely on incontestible law and undisputed facts, most of which were derived from *petitioners'* own testimony and arguments on appeal.

For example, the Court found that petitioners' own testimony improperly contradicted the written loan Guaranty Agreement, because petitioners testified that their

obligation to repay their loans as required by this agreement was subject to an oral *condition;* i.e. receiving a $2 million line of credit from the Bank. However, the Guaranty Agreement expressly stated that their duty to repay these loans was "*absolute* and *unconditional*". (Pet.App. A-32 to A-34.) Similarly, the appellate court determined that the Guaranty Agreement was "integrated", i.e. intended to be the complete and final expression of the parties' agreement, primarily because the Agreement contained an "integration" clause that "[petitioners] concede[d] they read, understood and discussed with their attorneys". (Pet.App. A-32.) This clause specifically provided that the Guaranty Agreement "embodies the *entire agreement* and understanding among the parties hereto and *supersedes all prior agreements and understandings* relating to the subject matter hereof." (Emphasis by appellate court). (Pet.App. A-23.) As the appellate court stated:

> "It is difficult to imagine how the parties could have more clearly expressed their intent to make the written instrument a full and complete expression of their agreement." (Pet.App. A-32.)

These direct citations conclusively show that petitioners' statements in their footnote 4 (i.e., "the appellate court's holding with respect to the integration issue was premised on its *inserted* finding . . . that banks don't make oral promises for a line of credit") were blatant falsehoods intended to mischaracterize the appellate decision and mislead this Court. The appellate court's *legal* determination was plainly premised solely on that court's eminently logical analysis of undisputed facts and the plain language of the agreements which petitioners admittedly negotiated and signed.

Reason Two – Petitioners' Oral Testimony Was Also Insufficient To Support The Verdict

As shown above, the appellate court's decision involved no federal question and was based on an adequate state legal ground completely separate from any subjective factual determination as alleged by petitioners. Nonetheless, it would be a disservice to this Court and the appellate court below if respondents stopped there and did not further expose the degree of petitioners' distortions of the Opinion below.

Even though the appellate court disposed of the entire case on parol evidence grounds, petitioners' oral testimony upon which the verdict was based was so insubstantial that the court felt compelled to add this as a second, equally sufficient basis for reversal. (Pet.App. A-43 to A-52.) In determining whether petitioners' testimony of an oral promise of a $2 million line of credit was "reasonable in nature, credible and of solid value" (the proper standard of review in California; see Pet.App. A-43), the appellate court did not rely on its "view of the world", but on *undisputed facts* taken from the entire record. Again, chief among these facts were the statements and conduct of petitioners themselves and their agents, which invariably contradicted their claims and showed them to be inherently unreasonable and incredible.[4]

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[4] The following facts are but a few examples:

1. Petitioners admitted that they were told that extension of a $2 million line of credit was

(Continued on following page)

Petitioners improperly omit any mention of these dispositive facts cited by the appellate court and mislead

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(Continued from previous page)

conditioned on approval by the Bank's head office, and that such approval was not granted; (Pet.App. A-9 to A-10, fn. 12; Pet.App. A-21 to A-22.)

2. Petitioners (who were complete strangers to the Bank) admitted that they were required to submit written financial statements to support their oral request for a line of credit, and that they failed to do so. (Pet.App. A-13, fn. 15; A-19.) They also admitted that the oral information they gave the Bank regarding this financial condition was materially *false*, and that they overstated their capitalization by almost *eight times* its real value; (Pet.App. A-20, fn. 28; A-48.)

3. Petitioners testified that getting a line of credit from the Bank was the most important reason they entered into the agreements to acquire the Kudsy auto parts company and assume its loans due to the Bank. (Pet.App. A-32; A-33 to A-34, fn. 44; A-47.) Yet, despite this claimed urgency, and despite the fact that they were represented by lawyers throughout the whole transaction, they never once even mentioned a line of credit in any of the *five* written contract offers they submitted to Kudsy, in any of their contemporaneous correspondence to the Bank, or in the integrated Guaranty Agreement, which expressly precluded any oral or prior agreement; (Pet.App. A-35; A-47.)

4. Petitioners' own lawyers, who were responsible for drafting these agreements, testified unequivocally that if there had been such an agreement for a $2 million line of credit, it surely would have been set forth in writing (Pet.App. A-11, fn. 12.); the trial

(Continued on following page)

this Court by stating that the appellate court relied solely on its own views of banking practices as the basis for its conclusion that petitioners' testimony was not "substantial evidence". Because the case below was plainly and properly decided on two independent state grounds, it is not subject to review by this Court.

III. PETITIONERS HAVE FAILED TO SHOW ANY "SPECIAL AND IMPORTANT REASONS" FOR THIS COURT TO GRANT REVIEW.

In addition to the multitude of fatal defects in petitioners' brief shown above, petitioners also have failed to establish any "special and important reasons" that their writ should be granted. Rule 10 of the Supreme Court states, in pertinent part:

> A petition for writ of certiorari will be granted only when there are special and important reasons therefor, (such as):

(Continued from previous page)

judge agreed: "And I have a very – I just have a very difficult time understanding, with the advice of counsel, if something was that important they would not have it included in the contract." (Pet.App. A-36, fn. 45.)

5. Petitioners' testimony failed to show any basic essential terms of the alleged oral loan agreements, such as rates of interest, repayment terms and schedules, and security, necessary to form a valid and enforceable loan agreement. (Pet.App. A-49, fn. 55.)

> (b) when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) when a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

It is, of course, abundantly clear that the California Supreme Court was never presented with and never decided any question of federal law in this case. (See App. B-1 to B-28.) Even disregarding this legal pre-requisite, petitioners' purported federal questions plainly fail to qualify for review.

Because the Seventh Amendment has no bearing on this case, petitioners are left with their claim that reversal of the verdict by the Court of Appeal violated their right to "due process". Although attractively packaged, this argument is ultimately just another empty box. First, it is predicated solely on petitioners' totally discredited claim that the court relied only on its "views", rather than the law and evidence as the Opinion below demonstrates. (Petition, p. 11) Second, unlike the *Haslip* case cited by petitioners, petitioners fail to identify any actual "procedure" that occurred in this case that allegedly threatens due process as to them or to other litigants. The appellate court did not vacate the instant punitive damages award because it disagreed with the procedure by which they were determined. Rather, the damages all fell because the

appellate court reversed the verdict pursuant to its finding that it violated the parol evidence rule, *a rule of contract law.* Petitioners do not argue that the California parol evidence rule violates their right to due process, nor do they argue that it conflicts with similar procedures adjudicated in other states.

Similarly, petitioners do not attempt to argue that the "substantial evidence" standard of review employed by California appellate courts violates due process or conflicts with other state standards for reviewing trial court decisions. Because petitioners' "due process" argument addresses only an aberrant "straw man" procedure solely of their own creation, and, nowhere followed by the appellate court below, it presents no conceivable basis for review of this decision.

IV. THIS COURT SHOULD AWARD COSTS AND FEES AGAINST PETITIONERS FOR FILING A CLEARLY FRIVOLOUS PETITION.

Rule 42.2 of the Supreme Court Rules provides for sanctions in the event petitioner submits a frivolous petition for writ of certiorari. It states, in pertinent part:

> Where a petition for a writ of certiorari, an appeal, or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against the petitioner, appellant, or applicant, or against the party's attorney or against both.

Respondents acknowledge that litigants are entitled to raise all *proper* argument that might give them reasonable grounds to seek review in this Court, and that this Court should therefore exercise flexibility and restraint in determining the appropriateness of sanctions. However, precisely because this is the court of last resort for a losing litigant, there is great potential for abuse by litigants and their lawyers driven to misstate facts and law or mischaracterize decisions to try to convince this Court that they have satisfied the stringent threshold requirements for its consideration for review. It follows that counsel appearing before this Court, who are required to be specially admitted on a showing of their good standing, should have a high duty to adequately review the facts and law of the case to ensure that they meet the criteria for consideration by this Court, and most importantly, to present these facts and law candidly and accurately to this Court.

Respondents submit that petitioners have plainly failed on both these counts. First, even the most minimal research would have shown that the Seventh Amendment does not apply to state civil jury trials, and that petitioners therefore have no grounds whatsoever to even request review by this Court. Because this law is so clear, and because petitioners made no effort to challenge this law, their petition is inherently frivolous.

Even more worthy of sanctions are petitioners' repeated and deliberate misstatements and distortions of the Court of Appeal Opinion, as shown above. The unfair effect of this conduct has been to force respondents to devote substantial time and expense to oppose and refute unfounded arguments and assertions that never should

have been filed. This has also imposed an undue burden on this Court, diverting it from consideration of other meritorious petitions. The effect goes deeper, because it forces this Court to be a "policeman", to scrutinize the truth and accuracy of statements in a process that should depend upon self-policing by the counsel permitted access to this Court. This Court should therefore award respondents their fees and costs in having to prepare this response, both to compensate respondents for this unfair and improper imposition, and to discourage these and other litigants from filing frivolous petitions in this Court.

CONCLUSION

For each of the reasons stated above, respondents Banco do Brasil, S.A. and Joao Stefanon respectfully pray that this Court deny the petition for writ of certiorari submitted by petitioners Latian, Inc. and Amanollah Sarbaz.

Respectfully submitted,

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Dated: May 22, 1992

APPENDIX

Civil No. B 045477

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BANCO DO BRASIL, S.A., Los Angeles Agency, a Banking association organized and existing under the laws of Brazil,

Plaintiff/Cross-Defendant/Appellant,

JOAO STEFANON, an individual,

Cross-Defendant/Appellant,

LATIAN, INC., a California corporation; AMANOLLAH SARBAZ, an individual; DOES 1-20, inclusive,

Defendant/Cross-Complainants/ Respondents and Cross-Appellants.

Appeal from the Superior Court of Los Angeles County
The Honorable Billy G. Mills, Trial Judge
The Honorable Richard A. Lavine, Post-trial Judge

RESPONDENTS' AND CROSS-APPELLANTS' PETITION FOR REHEARING

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Pursuant to California Rule of Court 27, Respondents and Cross-Appellants ("Latian") hereby petition the Court for a rehearing of this matter, which is the subject of the Court's Order filed September 27, 1991 ("Order").

I. INTRODUCTION

> Does the self-serving claim of the Respondents make any sense? Would a bank which has so meticulously documented every aspect of a transaction commit itself orally and so casually to such an important obligation? We think not. Banks simply do not do business that way.

(Order, p. 66.) These comments graphically illustrate the character of this Court's entire 70-page Order. This prejudice – and it must be prejudice or pre-judgment because no evidence in this record supports this statement – taints the entire Order. Had any juror expressed such a predisposition during voir dire, that juror would have been excused for cause. Had any trial judge expressed such a predisposition, that judge would have been justifiably disqualified. Had any expert witness expressed such a view, that expert would have been buried on crossexamination. Given the occurrences over the last five years with the savings and loan scandals and the BCCI fraud, it defies belief that any informed person could still hold such a belief.[1] Moreover, it is a travesty of justice that any

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[1] In rejecting similar assertions made by Banco's counsel during the post-trial hearings, Judge Richard Lavine drew the parties' attention to an article appearing in the Southern California Law Review concerning the history of bank fraud in the United States. Reporter's Transcript ("RT") 2061. *See* Hymanson, *Borrowers Beware: D'Oench, Duhme and § 1823 Overprotect the Insurer When Banks Fail,* 62 So. Cal. L. Rev. 253 (1988).

litigant should have its case determined, after 6 years and a full trial, by an appellate tribunal engaging in seat-of-the-pants *ex cathedra* pronouncements about how it believes banks do or do not act, with no citation to the law, the record, or any other authority.

Latian is appalled that this Court makes these and other unfounded assertions. If the Court is stating a rule of law or following precedent, the citation to the law ought to be provided so that further appellate review will not be frustrated. If the statements are based on evidence at trial, the Court should similarly cite to the record. If the Court is offering expert testimony, it should say so, and then be available for cross-examination.

While paying lip-service to the proper standard of review for cases on appeal,[2] this Court, in its Order, disregards established and controlling California law. The Court omits, misstates, and, in at least one case, creates out of whole cloth critical material facts in the record. This Court has further assumed the roles of jury, trial judge, accounting expert witness, banking expert witness, Portuguese translator, and omniscient observer of conversations known heretofore only to the parties involved.

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[2] On page 2 of the Order, the Court describes this as a "lender liability" case. This fundamental misconception reveals the Court's preconceived ideas about the case and portends its improper attempts to reform the evidence to fit its preconceptions. This is not a lender liability case, which is a newly-developed cause of action based upon a heightened duty of a bank when dealing with its customers. Rather, this case involves two traditional and well-established causes of action – fraud and breach of contract.

First, the Court applies an incorrect de novo standard in reviewing the trial court's determination that the Guaranty Payment Agreement is not an integrated document. Because the trial court's determination is one of *fact*, it must be granted deference by this Court, and may not be overruled unless no evidence supports the factual determination.

Second, in an effort to find some inconsistency between the oral promises of Banco do Brasil ("Banco") and the 1983 Payment Agreement, the Court makes the elementary mistake of confusing "conditional" obligations with conditions precedent. The two are not the same, and case law makes clear that an agreement may contain unconditional obligations, while at the same time the efficacy of the entire agreement is subject to a condition precedent.

Third, this Court stands on its head the principle of "substantial evidence" and completely usurps the function of the jury and determines for itself the credibility of witnesses it never observed. In doing so, the Court fails to follow applicable standards in determining whether evidence is "inherently improbable." Far from indulging in every reasonable inference in order to support the verdict, this Court has gone out of its way to find what it considers to be inconsistencies and improbabilities in the evidence. Instead of looking at the evidence in the light most favorable to Latian, this Court resorts to broad, unsupported statements of how a bank normally acts, and what obligations a bank would certainly put in writing.

Despite *direct* – not circumstantial – evidence from more than one witness on critical issues in this case, and the Court's *own* admission that "[t]here is, however, serious disagreement as to certain critical matters" (Order, p. 7, n. 5), this Court has determined that there was insufficient evidence to support the verdict. In completely disregarding the evidence presented by Latian, this Court ignores long-established California law that allows an appellate court to disregard evidence only where the testimony involves a "physical impossibility" or its falsity is "apparent without resorting to inferences or deductions." *People v. Huston*, 21 Ca1.2d 690, 134 P.2d 758, 759 (1943). Under this standard, the Court cannot disregard Latian's evidence.

Finally, in reweighing the trial evidence, this Court fails to give the trial court's post-trial determinations their required "great weight". Judge Lavine independently reviewed the evidence and concluded the verdict was supported. Moreover, he explicitly determined that the evidence supporting the verdict was *not* inherently improbable. RT 2060-61, 2082-83. This Court fails utterly to give this *factual determination* the deference it is due.[3]

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[3] On page 66 of the Order, this Court states that Latian relied upon "creative (and apparently charismatic) argument." Of course, this is no compliment; it is an unfounded excuse by the Court to explain why the jury found in favor of Latian. This record reflects absolutely no evidence of a verdict swayed by passion or prejudice. Thus, the Court resorts to back-handed rationalizations to support its decision. Is the Court also of the opinion that Judge Mills and Judge Lavine were additional "victims" of charisma?

Perhaps the most striking omission from the Court's recitation of "facts" is the determination of Judge Lavine in his order denying appellants' post-trial motions:

> The Court finds this is a situation in which Stefanon had a strategy to defraud the Sarbaz family as early as 1982 and fully informed his superior of the strategy; the course of conduct of the bank was a deliberate attempt to take advantage of the Sarbaz family; the bank made its representations to Latian repeatedly on every occasion Latian signed a document. After Latian delivered his check for $310,000 to be held in trust until the line of credit was approved, the bank broke its promise by appropriating the $310,000; the bank knew of the culpability throughout the events, as evidenced by Stefanon's contract, written reports, and the top officials, aside from Stefanon, tried to cover up.

Minute Order, September 29, 1989, Clerk's Transcript ("CT") 5360-63. In an attempt to discount the findings of Judge Lavine, the Court notes in footnote 4, page 6, that Judge Lavine "did not have a complete record of [the trial] testimony upon which to make his rulings, but only those portions thereof which the parties had periodically ordered during the trial and were able to make available to him." Far from a reason to discount Judge Lavine's findings, the fact that Judge Lavine found enough evidence to support the verdict in an incomplete transcript of the trial testimony *supports* his findings.

Although the Court's factual mistakes will be discussed in detail below, one stunning error is found on page 66 of the Order. The Court accuses Latian of relying on "documents improperly translated from Portuguese to

English," and without any supporting authority, purports to set out in footnote 20, page 21, the correct translation of the Portuguese in Plaintiff Exhibit ("PX") 54. First, the translations from Portuguese to English were stipulated by both parties. RT 916. Second, the Court is referring to Joao Stefanon's ("Stefanon") testimony on cross-examination when he attempted to disavow the language in the stipulated translation of PX 54. RT 1332-1345. This repudiation was the proper subject of cross-examination, and this Court cannot merely accept as true Stefanon's testimony at trial over the stipulated translation.

Another example of the inadequacy of the treatment of the trial record in the Court's Order is the complete omission of Stefanon's deposition testimony regarding the bank's promise to hold the $310,000 payment by Latian until Banco approved Latian's line of credit. In his deposition, read to the jury at trial, Stefanon acknowledged that the check was not to be cashed until Latian's line of credit had been approved by the head office:

> Q. What was your understanding as to why the Sarbazes were paying to the bank $310,000?
>
> A. Because the Sarbazes wanted to be separate – separated from the Kudsies. And they came to the bank and presented a check for $310,000 that was put in a side account for payment of their commitment with the bank as soon as we would have the approval from the head office for the deal.

RT 1308. At another point in his deposition, Stefanon conceded that the "deal" included both the agreement of Latian to repay Kudsy's debt to Banco, and the agreement

by Banco to grant Latian a line of credit. RT 1384. When confronted with this testimony at trial, however, Stefanon repudiated his prior testimony. RT 1308-09. This Court is not free to disregard the deposition testimony simply because Stefanon changed his story at trial.

The evidence presented by Latian is not "inherently improbable." It is not of such a nature that it cannot be believed by any reasonable person. Judge Lavine believed it, and according to this Court, the jury believed it. (Order, p. 51.) This Court has overstepped its role as a reviewing court, and has, to borrow the Court's own phrase, retried the entire case, resorting to "revisionist claims" because, at the end of this trial, the Court did not "care for the result." (Order, p. 58.) Because of the legal and factual errors contained in the Court's order, this matter must be reheard.

II. LEGAL ANALYSIS

A. THE COURT APPLIED THE WRONG STANDARD IN REVIEWING THE TRIAL COURT'S DETERMINATION THAT THE GUARANTY AGREEMENT WAS NOT INTEGRATED.

Citing California Code of Civil Procedure § 1856(d), the Court states that whether the parol evidence rule applies "so as to exclude any collateral oral agreement is one of law to be determined by the court." (Order, p. 38.) Section 1856(d), however, provides no support for the Court's conclusion. Section 1856(d) provides that whether an agreement is "intended by the parties as a final expression of their agreement" is an issue to be determined by the court, but it says nothing as to whether the

determination is one of law or fact. The Supreme Court of California has said since *Masterson v. Sine*, 68 Cal. 2d 222, 436 P.2d-56[1], 65 Cal. Rptr. 545 (1968), that the issue of whether a written agreement is integrated must be determined by all relevant factual evidence, including the circumstances surrounding the execution of the writing. *See, e.g., Stevenson v. Oceanic Bank*, 223 Cal. App. 3d 306, 272 Cal. Rptr. 757 (Cal. App. 1 Dist. 1990); *Mobil Oil Corp. v. Handley*, 76 Cal. App. 3d 956, 143 Cal. Rptr. 321, 324 (Cal. App. 2 Dist. 1978). Accordingly, "the trial court's ultimate conclusion on the issue of integration is entitled to the same deference on appeal as any other ruling of the court on an issue of fact." *Id.*[4]

This Court is bound by the trial court's determination on the integration issue if it is supported by substantial evidence; this Court certainly is not free to resolve the integration issue de novo. Because this was a factual determination, this Court must view the evidence "in the light most favorable to the trial court's determination, drawing all reasonable inferences and disregarding all contradictory evidence." *In re Marriage of Adkins*, 137 Cal.

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[4] This rule is the majority rule in the United States. *See, e.g., Brennan v. Carvel Corp.*, 929 F.2d 801, 807 (1st Cir. 1991); *United States v. Clementon Sewerage Authority*, 365 F.2d 609, 614 (3d Cir. 1966); *Transamerica Oil Corp. v. Lynes, Inc.*, 723 F.2d 758, 763 (10th Cir. 1983); *Morgan v. Stokely-van Camp, Inc.*, 34 Wash. App. 801, 663 P.2d 1384, 1389 (1983) ("Whether the parties intended the written contract to be the sole agreement is a question of fact."); *Alaska Northern Devel, v. Alyeska Pipeline Serv.*, 666 P.2d 33, 37 (Alaska 1983), *cert. denied*, 464 U.S. 1041 (1984) ("Whether a writing is integrated is a question of fact to be determined by the court in accordance with all relevant evidence.")

App. 3d 68, 75, 186 Cal. Rptr. 818, 821 (Cal. App. 2 Dist. 1982). *See also Campbell v. Southern Pacific Co.*, 22 Cal. 3d 51, 60, 583 P.2d 121, 148 Cal. Rptr. 596 (1978). Thus, in order to reverse the trial court's determination on this issue, this Court must conclude that the trial court had no basis whatsoever in determining that the Guaranty Agreement was not integrated. Under this standard, the Court's Order cannot stand; Judge Mills certainly had evidence before him that supported his conclusion that the Guaranty Agreement was not integrated.

First, the agreement for a line of credit is not an agreement that "would 'certainly' have been included in the writing," and it is exactly the type of agreement that "might 'naturally' have been made separately." *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 97 Cal. Rptr. 30, 34 (Cal. App. 4 Dist. 1971). Judge Mills had before him evidence of Banco's course of dealings with the Kudsy Companies. Contrary to this Court's factual representation in footnote 47 of its Order, in granting lines of credit to the Kudsy Companies, Banco entered into separate and distinct agreements covering each line of credit, *not all of which were in writing*.[5] Evidence before Judge Mills and the jury at trial established that the line of credit for one of the Kudsy Companies, Wholesale Auto Parts, Inc., was pursuant to an *oral* agreement, and was not embodied in

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[5] At page 50, at footnote 47, this Court incorrectly states, "Second, the record reflects that the credit line arrangements with Kudsy were all handled as a part of the written documentation. . . . "

or evidenced by a written agreement. CT 2287, Exhibits 47-51, Deposition ("Depo.") of A. Ferral, p. 68.

Banco had an established practice of *not* embodying its agreements for lines of credit in other documents such as promissory notes and guaranties. CT 2287, Exhibit 4; CT 2287, Exhibit 6; CT 2287, Exhibits 47-51. There was not a single agreement embodying all of the rights and obligations of Banco and the borrower under the line of credit. There was a multiplicity of separate and distinct agreements, not all of which were in writing. Such evidence is clearly sufficient to uphold Judge Mills' factual determination, affirmed by Judge Lavine, that the Guaranty Agreement would not certainly have included the parties' agreement concerning a line of credit.

In addition, the Guaranty Payment Agreement is replete with references demonstrating that the parties had a separate agreement granting Latian a line of credit. The Guaranty Agreement incorporates as an exhibit the Security Agreement of September 27, 1982, between Banco and Latian. That agreement explicitly recites that Latian, as Debtor, is granting a security interest to Banco, as Secured Party, "as an inducement to Secured Party to extend credit to Debtor from time to time. . . . " PX 1. "Debtor," as noted by this Court, is defined as Latian. Not only does this Court fail to indulge Judge Mills and Latian all reasonable inferences from this document to support Judge Mills' determination, the Court completely ignores and discounts this document because in the Addendum, the document refers to inducing the secured party to make line of credit facilities available to the

borrowers, and "borrowers" is defined as Kudsy in the body of the Security Agreement.[6]

Relying on the general rule that typed language "controls" the printed language in the Security Agreement, and also on its wholly unsupported finding that the Security Agreement was attached to the Guaranty Agreement as "an historical exhibit," the Court disregards the preliminary language of the Security Agreement. The Court is wrong on two counts. First, there is no inconsistency between the Addendum to the Security Agreement, which refers to Borrowers, and the Security Agreement, which refers to Debtors, i.e., Latian. Thus, the rule cited by the Court to discount the Security Agreement itself, California Civil Code § 1651, does not apply because it only applies where an inconsistency exists between typed and printed material. Second, no evidence supports the Court's conclusion that the Security Agreement was included in the Guaranty Agreement as merely "an historical exhibit." To the contrary, the *typed* language of the Guaranty Agreement states that the Security Agreement is amended so as to include "the obligations evidenced by the Note" within the definition of "Obligations under Paragraph 3 of the Security Agreement." PX 1, p. 2.

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[6] The Court ignored the evidence at trial that supported the inference that the Addendum's reference to Borrowers was a mistake. In 1983, Kudsy was no longer in business and it obviously and beyond any doubt made no sense to view the Addendum as a document contemplating that Kudsy – but not Latian – would be utilizing a line of credit in the future. No reasonable, fair, or impartial person could possibly hold otherwise. And nobody did – Judge Mills did not, the jury did not, and neither did Judge Lavine.

Even Banco's counsel at oral argument clearly and unequivocally admitted that Banco would have made a separate agreement for a line of credit with Latian, rather than include it in the Guaranty Agreement. The Court's Order ignores this admission. During argument, counsel for Banco conceded several times that an agreement for a line of credit, given Banco's normal practices, would be a separate agreement from that signed by Latian in 1983. Certainly, the concessions of Banco on this point are relevant to the discussion, and moreover, should be conclusive. Banco's counsel acknowledged that any agreement for a line of credit would have been the subject of a discrete agreement apart from the agreement to repay the Kudsy debt. This being so, the parol evidence rule has no application in this case.

On Page 50 of its Order, the Court notes:

> It is inconceivable that an additional agreement to extend further credit would not be provided for therein. That a bank, which has gone to such lengths to document an entire debt relationship, would make a cavalier oral commitment, such as is described in respondents' testimony, to provide further open-ended credit is an incredible proposition.

The Court's comments beg the question. First, it is not inconceivable that an additional agreement to extend credit would not be provided in a written document signed by Banco and Latian – Banco did that very thing with the Kudsy Companies. Second, the Court refers to the bank having gone to "such lengths" to document an entire debt relationship; the Guaranty Payment Agreement is three pages long – what other "lengths" the Court

is referring to are anyone's guess. This Court clearly had the preconceived notion that a bank would not make any commitment without putting it in writing, and made that the starting point of its analysis. Of course, there is no evidence in the record to support the Court's generalization. Further, there is also no evidence in the record to support the Court's assumption that banks do not make "cavalier oral commitment[s]" to their customers. Had such generalized "custom and practice" evidence been offered at trial by the bank, it no doubt would have been correctly excluded, or else subject to devastating crossexamination as to what banks actually do and have done in the real world (*e.g.*, the savings and loan debacle, BCCI), of which this Court is apparently woefully in ignorance.

Because the record contains evidence to support Judge Mills' conclusion that the Guaranty Agreement was not integrated, his finding on this fact must be affirmed. Accordingly, this Court's September 27 Order to the contrary must be corrected. Once this Court upholds Judge Mills' determination that the document is not integrated, the parol evidence rule has no application in this case, and provides no basis for excluding any of Latian's evidence.

B. BANCO'S ORAL PROMISES ARE NOT INCONSISTENT WITH THE 1983 PAYMENT AGREEMENT.

This Court holds that the oral agreement "directly contradicts the written instrument." (Order, p. 43.) The Court reasons that since the oral agreement relating to the extension of a $2 million line of credit was claimed by

Latian to have been an indispensable *condition* to its obligations under the written Guaranty Agreement, the oral agreement was "entirely and directly inconsistent with an express term of the integrated written agreement [that] 'Latian and Sarbaz . . . agree that such obligations are absolute and *unconditional.*' " (Order, p. 45.) The Court then concludes that "[i]t is simply not possible to reconcile the respondents' claim of an oral condition on which their liability to Banco depends with their expressed written commitment that there are no conditions to such liability." (*Id.*) The Court completely misapprehends the nature of the condition and misapplies California law as to the admissibility of oral evidence of a condition precedent to an unconditional obligation to pay.

The applicable and correct rule of law is set forth in 3 Corbin on Contracts, § 589:

> A written document, unconditional on its face and fully executed, can be shown by oral testimony to have been delivered subject to a condition precedent.

Thus, in *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 97 Cal. Rptr. 30 (Cal. App. 4 Dist. 1971), the California Court of Appeals acknowledged that under California law parol "evidence is admissible to prove a condition precedent – that a contract is not to take effect until a certain condition happens. . . . " *Id.* at 35. Moreover, the Court noted evidence that an *unconditional* promise to pay would be ineffective until a certain event happened is *not* inconsistent with an unconditional promise to pay. *Id.*

Likewise, in *FPI Development, Inc. v. Nakashima*, 231 Cal. App. 3d 367, 282 Cal. Rptr. 508, 525 (Cal. App. 3 Dist. 1991), the Court of Appeals stated:

> . . . there is no necessary contradiction between the statement of an obligation unconditional in form and the statement of a condition to its enforcement, e.g., I am obligated to do an act, *unless* a specified contingency occurs.

Similarly, in *United States v. Hub City Volkswagen, Inc.*, 625 F.2d 213, 215 (9th Cir. 1980), the Ninth Circuit Court squarely held that a written guaranty which stated that the guarantor "unconditionally guarantees" a loan is *not inconsistent* with an oral condition precedent that the guarantee would not become effective until a certain event happened. In so holding the Court stated:

> Appellees emphasize, first, that each guaranty states that the guarantor "unconditionally guarantee[s]" the loan, . . .
>
> Neither of these two clauses, however, had any force until the guaranty became effective. If the guarantors are able to establish at trial that they did in fact have the alleged agreement with the bank officials then neither of these two clauses ever became effective and neither is inconsistent with the oral condition precedent.

625 F.2d at 215.

Contrary to this Court's assertion, the parol evidence rule does not exclude evidence of an oral condition precedent to the effectiveness of an unconditional promise to pay; in this case, the jury found precisely such an oral condition precedent existed to the guarantees executed by Latian and Sarbaz.

C. NO MATTER HOW THIS COURT VIEWS THE PAROL EVIDENCE RULE, BANCO IS NOT ENTITLED TO JUDGMENT REVERSING THE JURY'S DETERMINATION OF LATIAN'S FRAUD CLAIM.

So eager to overturn completely the jury's verdict, the Court fails to notice that even under the Court's analysis of the parol evidence rule, Latian's fraud claims accruing before January of 1983 are not impacted by the 1983 Payment Agreement. By 1983, Latian had incurred $860,000 in damages due to Banco's fraud, and the 1983 Agreement in no way released Banco from its liability.

The 1983 Payment Agreement speaks only of Latian's "unconditional" obligation to pay under *that* agreement. That agreement came into being in January of 1983. By that point, however, Banco had already defrauded Latian, and Latian's claim for fraud had accrued. At trial, Latian's evidence showed that the fraud began in the summer of 1982 and continued throughout the relationship between Latian and Banco. Latian's initial payment to Kudsy of $400,000 was the result of the bank's fraud, and every subsequent payment was a result of the bank's fraud. As of January, 1983, Latian had expended approximately $860,000 as a direct result of Banco's fraud. RT 549-550. This evidence is admissible *regardless* of whether the 1983 Agreement is integrated. The agreement was not a *release* of any claims by Latian. Because Latian's damages for fraud had accrued by that time, under no circumstances does the parol evidence rule require a complete reversal and JNOV on Latian's fraud claim.

D. THE COURT IMPROPERLY DISREGARDED LATIAN'S EVIDENCE SUPPORTING THE JUDGMENT.

This Court concludes that the evidence presented by Latian at trial is not "reasonable in nature, credible, [or] of solid value." (Order, p. 61, quoting *In re Teed's Estate*, 112 Cal. App. 2d 638, 247 P.2d 54, 58 (Cal. App. 2 Dist. 1952).) In reaching this conclusion, however, this Court failed to apply the correct standard in determining whether competent evidence may be disregarded on appeal. The case this Court relies on to support its complete rejection of Latian's evidence, *In re Teed's Estate*, is misconstrued by the Court. In *In re Teed's Estate*, the court did not conclude that the testimony supporting the verdict was unbelievable, but only that the actual testimony did not support the conclusions for which it was admitted. In fact, the court notes that "substantial evidence" is defined in 40 Words and Phrases, as evidence "which, if true, has probative force on the issues." 247 P.2d at 58. Thus, under *In re Teed's Estate*, the determination of whether evidence is true or false is *not* a part of determining whether the evidence is substantial in nature. In fact, the Supreme Court of California noted in *In re Teel's Estate*, 25 Cal. 2d 520, 154 P.2d 384, 388 (1944):

> All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.

See also In re Trefren's Estate, 86 Cal. App. 2d 139, 194 P.2d 574. 575 (Cal. App. 1 Dist. 1948).

Following this standard, the Court must accept as true the evidence most favorable to Latian and discard that evidence unfavorable to Latian. This, the Court has obviously not done. Rather, in the guise of "looking at the record as a whole," this Court has made the determination that the evidence most favorable to Latian is in fact false, something that an appellate court has no authority to do given the facts in this record.

The correct standard is set forth by the California Supreme Court in *People v. Huston*, 21 Cal. 2d 690, 693, 134 P.2d 758, 759 (1943):

> Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation omitted.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations omitted.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations omitted.]

See also Tobola v. Wholey, 75 Cal. App. 2d 351, 170 P.2d 952, 955 (Cal. App. 3 Dist. 1946) (although testimony that is inherently improbable must be disregarded, "such action is warranted only where the testimony involves a physical impossibility or its falsity is apparent without resort

to inference or deduction."); *Butticci v. Schindel Furniture Co.*, 152 Cal. App. 2d 165, 313 P.2d 62, 65 (Cal. App. 1 Dist. 1957) (" . . . the mere fact that the admitted circumstances make the story of the witnesses seem improbable will not justify a reversal by an appellate tribunal upon the ground that the verdict is contrary to the evidence."); *Gallipo v. City of Long Beach*, 164 Cal. App. 2d 70, 330 P.2d 91, 94 (Cal. App. 2 Dist. 1958) ("[w]hen any testimony believed by the trier of the facts relates events which are not completely contrary to human experience or would seem physically impossible, the judgment cannot be reversed on appeal on the ground that such testimony is inherently unbelievable.")

In this case, none of the evidence presented by Latian, either through direct testimony of Manoucher and Amanollah Sarbaz or the cross-examination of Stefanon, presents examples of testimony that relate to events that are physically impossible. There is nothing physically impossible about a bank making an oral promise to a client. The only other legally justifiable reason for this Court completely to disregard Latian's evidence is if the evidence – *without resorting to inferences or deductions* – is obviously false.

The evidence presented by Latian is not obviously false without resort to inference or deduction. The evidence is only improbable if one looks at the testimony with the preconceived notion that a bank would never make an oral promise and, likewise, no one would rely upon an oral promise from a bank. Neither of these assumptions is a self-evident universal truth.

This Court has reviewed and judged the evidence with the predisposition that if only two people in a meeting have a particular recollection of the conversation, which is denied by other people at the meeting, the two people must be giving inherently improbable testimony. This Court has compared the testimony of Manoucher and Amanollah Sarbaz – which is direct evidence of an oral promise to grant Latian a line of credit – with the testimony of bank representatives. For some reason, this Court was predisposed to believe the bank representatives, and not Latian's representatives. The Court went so far as to "contrast" the testimony of Manoucher Sarbaz with that of Stefanon and other witnesses to conclude that Stefanon's version of the July 21 meeting was more "consistent" with other evidence presented. (Order, pp. 12-15, n. 12.) The Court's work should have ended when it set forth the testimony of Manoucher Sarbaz on the July 21 meeting. There is nothing in this testimony that is either at variance with physical facts or is repugnant on its face.[7]

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[7] Substantial evidence may consist of the testimony of a single witness, even if that one witness is the testimony of a party. *See, e.g., In re Marriage of Kahan*, 174 Cal. App. 3d 63, 68, 219 Cal. Rptr. 700, 704 (Cal. App. 6 Dist. 1985); *Muffett v. Royster*, 147 Cal. App. 3d 289, 303, 195 Cal. Rptr. 73, 81 (Cal. App. 2 Dist. 1983); *Coldwell, Banker & Co. v. Pepper Tree Office Center Associates*, 106 Cal. App. 3d 272, 277, 165 Cal. Rptr. 51, 54 (Cal. App. 4 Dist. 1980); *Clark Equipment Co. v. Wheat*, 92 Cal. App. 3d 503, 518, 154 Cal. Rptr. 874, 881 (Cal. App. 1 Dist. 1979).

The Court finds that the "respondents' version was neither reasonable nor credible." In reaching this conclusion, the Court found that Stefanon's denial that a line of credit was ever promised at the meetings of June 14, July 21, and August 25, 1982, was more believable and more consistent with other evidence than was the Sarbazes' testimony. The Court also found, unaided by any evidence in the record, that "[t]hese circumstances are consistent with common banking practices,. . . . " (Order, p. 62.) Of course to come to the conclusion that the bank never promised a line of credit to Latian, the Court had to pick and choose from the various versions of the facts testified to by Stefanon. This is improper, and an improper review of "the entire record." The Court may not so weigh the evidence on appeal.

The following is a list of other instances where the Court improperly compares, contrasts, ignores, or in some way explains away testimony that any rational and unbiased person would accept as evidence that supports the verdict:

1. On pp. 10-11, the Court notes that Manoucher testified that at the initial meeting between the Sarbazes and Banco, Manoucher asked Stefanon, "If and when we buy it [i.e., Kudsy], would you cooperate with us? Would you let us assume the line of credit?" Manoucher testified that Stefanon replied, "If and when you buy the business, we will cooperate with you. And there should be no problem to let you assume the line of credit. . . . There are some paper works and formality you have to do with the head office, but there would

be no problem and we would cooperate with you." From this testimony, this Court concludes that no one at trial disputed that there was no discussion at that time of Latian having a line of credit. The testimony quoted by the Court clearly indicates that it was understood Latian would assume the line of credit, i.e., step into the shoes of Kudsy. This is far different from the tortured construction the Court gives the testimony that Stefanon was only saying that Latian could use Kudsy's existing line of credit if Latian was working with Kudsy.

2. On p. 11, the Court states that Kudsy's existing line of credit was entirely drawn down except for "$150,000 and would be of no practical importance without substantial pay-downs to Banco." Here, the Court makes a wholly unsupported conclusion regarding the importance of any revolving line of credit to Latian, which is directly contrary to the evidence admitted at trial. This comment indicates that the Court does not understand how a revolving line of credit works. For an explanation of the value of a revolving line of credit to Latian, see the trial testimony of Manoucher Sarbaz, RT 962-66.

3. On p. 12, the Court states, "Manoucher requested that Latian be allowed to assume the credit line and Stefanon responded that Banco's head office would have to approve any additional credit and that the respondents would have to provide adequate financial information." By this statement,

the Court has completely disregarded Manoucher's testimony that Stefanon told him that head office approval was a mere "formality."

4. On p. 12, n. 12, this Court "contrasts" the testimony of Manoucher with that of Stefanon and Nagata, and finds that Stefanon's testimony is more consistent with the weight of the evidence. Of course, this Court is not permitted to weigh the evidence, and inconsistencies in testimony among witnesses is not an adequate reason to disregard evidence.

5. On p. 13, n. 13, this Court concludes that Nagata's testimony "rejects" any "private conversation" between Amanollah Sarbaz and Stefanon. Nagata did not testify he had Amanollah in sight at all times during the meeting and certainly gave no opinion as to whether Amanollah and Stefanon spoke privately. A private conversation between the two men is not on its face "inherently improbable."

6. On p. 16, the Court states that " . . . Banco's representatives who attended the closing stated, on Stefanon's instructions, that Banco would not oppose the transaction (i.e., the transfer of the inventory to Latian and its assumption of the secured inventory liability). . . . " This statement by the Court completely disregards Stefanon's deposition testimony that he understood the "transaction" to involve two integrated points: (1) that the Sarbazes purchase the

Kudsy Companies, and (2) that the Sarbazes be given credit from the bank. RT 1384.

7. On p. 18, n. 16, the Court acknowledges the August 11, 1982, letter from Koudsi and Antoci to Banco, PX 10. This letter acknowledges the intent of everyone at that time that Latian would be receiving a line of credit from Banco. This evidence is ignored by the Court.

8. On p. 19, the Court states that Stefanon denied that the Sarbazes ever gave the $310,000 check to be held in escrow until the bank approved Latian's line of credit. By making this statement, the Court improperly ignores Stefanon's deposition testimony in which he states that the check was to be put into a side account until the bank approved the complete transaction, as understood by Stefanon to be both the transfer of the Kudsy businesses to Latian and the line of credit from Banco to Latian.

9. On p. 23, n. 23, the Court asserts that the assumption of Kudsy's indebtedness "was the idea of the respondents, not Banco." This "testimony" is found nowhere in the record. Every offer made to Kudsy to purchase its assets included a provision that Banco must approve the transaction, and at the very beginning, Latian was interested in the business in large part because of the available $2 million line of credit. The evidence supports Latian's contention at trial that once Banco met the Sarbazes, it did all it could to entice Latian into taking over

the debt of Kudsy by promising the $2 million line of credit, and had that strategy from the beginning.

10. On p. 28, in the body of the Court's Order, the Court states that according to Stefanon, the information that Latian's line of credit had been refused was "immediately communicated to Manoucher by telephone. . . . " Only in footnote 31 does this Court mention that Manoucher denied that he was ever advised by Stefanon prior to June of 1983 that the credit line had been refused.

11. On p. 43, this Court points out that Manoucher testified that the line of credit from Banco was critical to Latian's purchase of the Kudsy inventory, and in fact Latian would not have been interested in the Kudsy Companies without the line of credit. Rather than reasonably infer that a good business person would never have bought the companies without first ensuring that the line of credit was going to be available, this Court infers the opposite and concludes from the absence of a written agreement, that the agreement obviously was never made.

12. On p. 60, in n. 54, the Court concludes that a review of Stefanon's deposition testimony "in context" reflects that his testimony was directed at Banco's approval of Latian's assumption of Kudsy's outstanding indebtedness, i.e., "loan", and not the line of credit at issue in the trial. This is completely conclusory on the part of this Court, and in fact flies in the face of Stefanon's testimony. During his deposition, his own

> counsel clarified that when counsel for Latian used the term "approved the loan," what was meant was 'approved the line of credit.' " RT 1293-94.

The Court also finds that the conduct of the respondents is inconsistent with their testimony that the $2 million line of credit was crucial to their purchase of the Kudsy assets. The Court finds it curious and incredible that Latian would not have requested its counsel to put such a promise in writing. (Order, p. 63.) Of course, this is sheer speculation on the Court's part, and nothing in the record compels the conclusion that it would be incredible for Latian to rely on an oral promise. In fact, the only evidence concerning this issue was the testimony of Amanollah Sarbaz, who testified that in building his businesses in Iran, he dealt on a verbal and hand-shake basis in arranging for and using lines of bank credit. RT 516-519, 611-12.

Likewise, without any testimony to support its statement, the Court notes on page 64: "A major extension of new credit would reasonably, if not obviously, require the submission of written financial statements justifying it." Again, nothing in the record supports this assumption, and in fact Manoucher Sarbaz denied that Banco ever made it a requirement of receiving the line of credit that financial statements be given to the bank. The evidence at trial supported the inference that it would be *reasonable* for Latian to rely on the bank's promise of a line of credit without providing the bank with financial statements. Banco told Latian that there would be no problem with obtaining a line of credit; the bank knew from the Kudsy Companies that the Sarbazes had substantial wealth, and

that they were very successful businessmen in Iran. Moreover, it is not *unreasonable* to assume that Banco would be happy with *anyone* taking over the debt of the Kudsy Companies given Banco's knowledge that the Kudsy Companies were in financial trouble.

Finally, the Court concludes its comments regarding the sufficiency of Latian's evidence by asking the following questions, and answering them, again without any support for the generalizations made:

> Does the self-serving claim of the respondents make any sense? Would a bank which has so meticulously documented every aspect of a transaction commit itself orally and so casually to such an important obligation? We think not. Banks simply do not do business that way.

(Order, p. 66.) Again. the record is devoid of any evidence to support a generalization of how banks do business. Moreover, if any witness at trial had attempted to offer such evidence, that witness would have immediately been subject to cross-examination concerning the myriad of established instances of bank fraud in the United States and the world in the past ten years.

E. THE COURT FAILS TO GIVE THE TRIAL COURT'S DECISIONS THEIR REQUIRED WEIGHT.

Pursuant to § 661 of the Cal. Code of Civ. Proc., Judge Lavine ruled on Banco's post-trial motions, and specifically found that the evidence supported the jury's finding on liability and compensatory damages. A trial court's denial of the motion for a new trial must be given

great weight. *E.g., Seffert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 364 P.2d 337, 342, 15 Cal. Rptr. 161, (1961) *Torres v. City of Los Angeles*, 58 Cal. 2d 35, 372 P.2d 906, 917, 22 Cal. Rptr. 866 (1962); *Sturges v. Charles L. Harney, Inc.*, 165 Cal. App. 2d 306, 331 P.2d 1072, 1082 (Cal. App. 1958). Instead of following this established standard of review, this Court has utterly ignored and disregarded the findings of Judge Lavine.

The only attack this Court makes on Judge Lavine's findings is that he did not have the entire trial transcript at his disposal when ruling on the post-trial motions. This fact, however, is no legal attack on his determinations. The California Code of Civil Procedure recognizes that a trial transcript will not always be available within the 60-day period allowed for post-trial motions, and the legislature made provision for an alternative method of providing a Court with the factual basis to rule on such post-trial motions. Section 660 provides that if a transcript is not available, "the reporter must upon request of the Court or either party, attend the hearing of the motion and shall read his notes, or such parts thereof as the court, or either party, may require." If a transcript is not available, a party moving for a new trial must avail itself of the right to call the court reporter. Banco did subpoena the court reporter, and at the hearing for a new trial, the court reporter was in attendance. At no point during the hearing did Banco request the reporter to read his notes. *See In re Marriage of Liu*, 197 Cal. App. 3d 143, 242 Cal. Rptr. 649, 654 (Cal. App. 6 Dist. 1987), where the Court recognized that the ability to have the reporter read portions of the transcript is an adequate substitute for the transcribed transcript.

CCCP § 661 provides that if the judge who presided at trial is unable to hear the motion for a new trial, that motion shall be heard and determined "by any other judge of the same court." Judge Lavine had full power in making his determinations on the post-trial motions; they must be given the weight they are due. This, the Court has not done to date.

III. CONCLUSION

This Court's Order of September 27, 1991, displays an unprecedented disrespect for the Seventh Amendment of the Constitution of the United States, California law, the jury system, California juries, California trial judges, and the rights of litigants. In reaching its decision, this Court has revived arguments waived by Banco, believed the impeached testimony of Stefanon, who was found personally liable for Banco's fraud, ignored factual findings of other judges, and misstated facts, and misapplied law. Latian is entitled to a rehearing.

Dated: October 14, 1991

Respectfully submitted,

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SUPREME COURT OF CALIFORNIA

Civil No. B 045477

BANCO DO BRASIL, S.A., Los Angeles Agency, a Banking association organized and existing under the laws of Brazil,

Plaintiff/Cross-Defendant/Appellant,

JOAO STEFANON, an individual,

Cross-Defendant/Appellant,

LATIAN, INC., a California corporation; AMANOLLAH SARBAZ, an individual; DOES 1-20, inclusive,

Defendant/Cross-Complainants/
Respondents and Cross-Appellants.

Appeal from the Court of Appeals
of the State of California
Appellate Justice Croskey
Concurrences by Justices Klein, P.J. and Danielson

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Pursuant to California Rules of Court 28 and 29, Respondents and Cross-Appellants ("Latian") hereby petition this Court for review of the decision of the Court of Appeals in this matter, filed September 27, 1991 ("Order"). Latian went to the Court of Appeals with a judgment of $10.5 million in its favor. It left with a judgment of more than $2 million against it, with no right even to a new trial. The basis for the Appellate Court's decision was its *a priori*, undocumented, and unsupported view that "Banks simply do not do business that way." To redress this affront to justice and the judicial process, Latian petitions this Court for review.

This case involves claims of fraud and breach of contract by Latian against a Brazilian bank, appellant Banco do Brasil ("Banco"), owned 51% by the Government of Brazil, arising out of a transaction whereby Latian agreed to purchase the assets, and assume certain liabilities to Banco, of the Kudsy Companies – a customer of Banco in financial distress. Latian alleged, and the jury found, that Banco fraudulently induced Latian to proceed with this transaction by falsely promising to provide Latian with a $2 million line of credit previously given to the Kudsy Companies. The jury found the promise to

constitute fraud, and the failure to provide the line to be a breach of contract. The trial court, in denying Banco's post-trial motions, concurred, with extensive specific findings.

> "The court finds this is a situation in which Stefanon had a strategy to defraud the Sarbaz family as early as 1982 and fully informed his superior of the strategy; the course of conduct of the bank was a deliberate attempt to take advantage of the Sarbaz family; the bank made its representations to Latian repeatedly on every occasion Latian signed a document. After Latian delivered his check for $310,000 to be held in trust until line of credit was approved, the bank broke its promise by appropriating the $310,000; the bank knew of the culpability throughout the events, as evidenced by Stefanon's contract written reports, and [that] the top officials, aside from Stefanon, tried to cover up." (Clerk's Transcript ("CT") 5360-5363.)

Concluding, without citation to authority of any kind, whether of law or fact, that "Banks simply do not do business that way," (Order, p. 66) the Appellate Court reversed on the ground of parol evidence, which Banco had not even briefed in its opening and reply briefs. From this wholly improper "trial by appellate court," Latian petitions this Court for review.

I. INTRODUCTION/ISSUES PRESENTED FOR REVIEW

In a patently result-oriented opinion, the Appellate Court ignored and disregarded the evidence supporting

the jury's verdict, improperly substituted itself as a *de novo* factfinder, and misapplied California law governing appellate review of a jury verdict. Only by so doing could the Appellate Court conclude that Latian's "version was neither reasonable nor credible." (Order, p. 62.)[1] Six years of litigation and a four-week jury trial notwithstanding, the Appellate Court assumed the role of factfinder and, based upon *ex cathedra* assumptions about "common banking practices," (Order, p. 62) contradicted by the evidence at trial, decided that the jury reached the wrong verdict. This Court must review the decision of the Appellate Court to assure uniformity in the standards of review applied by California appellate courts, and to correct the critical misstatements and omissions of fact committed by the Appellate Court[2]

Issues Presented for Review

1. May an appellate court disregard a trial court's finding of fact that a written agreement was not integrated, when the trial court's finding was supported by substantial evidence?

2. Is an oral condition precedent to the efficacy of a written promise to pay, unconditional in

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[1] This conclusion was specifically rejected by the trial court in response to Banco's post-trial motions. See quote in text, above.

[2] The Appellate Court's misstatements and omissions of material fact were pointed out to the Appellate Court, Pursuant to California Rule of Court 27, in a Petition for Rehearing timely filed by Latian. Latian's Petition for Rehearing was denied on October 28, 1991.

form, inconsistent with the written promise and therefore inadmissible under the parol evidence rule?

3. May an appellate court disregard evidence accepted by a jury in favor of evidence rejected by the jury, because the appellate court considers the evidence rejected by the jury more credible?

4. May an appellate court disregard the trial court's denial of a new trial motion on the ground that the trial court did not have a full transcript before it when ruling on the post-trial motions?

II. THE JURY'S VERDICT AT TRIAL

Trial commenced in this action on June 12, 1989, before Judge Mills and a jury. At the conclusion of trial, the Court submitted special interrogatories to the jury. (CT 3672-3674.) On July 12, 1989, the jury rendered its verdict. Banco went to the jury on two causes of action: (1) for money owed on promissory notes and guarantees, and (2) for fraud against Latian, Amanollah Sarbaz, and Manoucher Sarbaz for allegedly signing the promissory notes and guarantees with no intention to pay. The jury found against Banco and in favor of Latian on both causes of action. Latian went to the jury on two causes of action: (1) breach of contract, and (2) fraud[3] The jury

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[3] In its decision, the Appellate Court mischaracterized this as a "lender liability" case by Latian. (Order, P. 2.) It is not. Latian's claims raise no special issues of lender duties and obligations to borrowers. Latian's claims are basic fraud and

(Continued on following page)

found in favor of Latian on both its claims. The jury awarded $1.9 million in damages for fraud, $3.6 million for breach of contract, $22 million in punitive damages against Banco, and $500,000 in punitive damages against Banco's managing agent in Los Angeles, Joao Stefanon ("Stefanon").

Judgment was entered on the verdict on July 12, 1989. (CT 3663, 3675.) On August 15, 1989, Banco moved for judgment notwithstanding the verdict or a new trial on numerous grounds, many of which were abandoned on appeal. (CT 4150-4208; 4248-4343.) Before the motions could be heard, Judge Mills became incapacitated, and was replaced on the case by Judge Lavine. During the final week in which Judge Lavine had jurisdiction to hear post-trial motions, Banco filed three additional motions to have the verdict set aside. (CT 5272-5288; 5348-5355; 5393-5429.) Judge Lavine denied all of Banco's post-trial motions, with the exception of the motion directed at the issue of punitive damages. Judge Lavine remitted the punitive damages against Banco to $5 million. (Reporter's Transcript ("RT") 2029-2085; CT 5266-5268.) As to Stefanon, Judge Lavine remitted the punitive damages to $5 solely because of the absence of proof as to Stefanon's net

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breach of contract claims against a bank. The only exotic or unusual aspect of the case is that the bank is foreign, 51% owned by the Government of Brazil. This circumstance, however, has no impact on the straightforward and unremarkable nature of the law to be applied. Obviously, foreign banks that avail themselves of the privilege of doing business in this state must expect to comply with the most basic and time honored precepts of the law of fraud and contract.

worth. (CT 5360-5363; 5476-5478.) In lieu of submitting to a new trial, Latian accepted the remittiturs as to both Banco and Stefanon. (CT 5336-5339; 5483-5485.)

III. THE OPINION OF THE APPELLATE COURT

In overturning the jury's verdict, the Appellate Court made the following alternate "findings" contrary to the jury and Judges Mills and Lavine:

> (1) A Guaranty Payment Agreement executed by the parties in January 1983 was a fully integrated document, so that any evidence of an oral agreement inconsistent with the Guaranty Payment Agreement could not be considered under the parol evidence rule; and
>
> (2) Even if properly admitted, the evidence was insufficient to meet the standard of substantial evidence required to sustain the verdict.

In finding that the Guaranty was "fully integrated" the Appellate Court failed to give proper deference, under California law, to the trial court's finding of fact that this Agreement was *not* integrated. In finding the evidence insufficient under the standard of substantial evidence, the Appellate Court disregarded the evidence favorable to Latian in support of the jury verdict, relied upon evidence rejected by the jury, and misapplied California law. Finally, the Appellate Court's opinion is replete with misstatements and omissions of material fact, from the first page – where Latian's claims are incorrectly described as "lender liability" – to the end of the opinion where the Appellate Court states that "there was no evidence whatever of any false representation by Banco or Stefanon and certainly there was no solid or

credible evidence of an intent to defraud," (Order at 67) – all arising from the Court's outrageous *a priori* prejudgement that "Banks simply do not do business that way."

No civil litigant in the courts of the State of California should go through a four-week jury trial and review by two trial court judges, and then be deprived of a substantial verdict by an Appellate Court that, without regard to either the law or the evidence, declares that "Banks simply do not do business that way," and reverses the judgment on that basis. As this country digs out from under the wreckage of Columbia Savings, BCCI, and the rest of the savings and loan debacle – a veritable saturnalia of bank misfeasance, fraud, and greed – the Appellate Court in this case creates a world-wide safe harbor for all such rogues and scoundrels by announcing California's new rule of law: "Banks simply do not do business that way." Moreover, this so-called rule will be of particular comfort to Banco's principal owner, the world's largest third-world debtor in default, with defaulted obligations of $113 billion, $60 billion of which is owed to commercial banks in the United States, who will now find themselves the major victims of the new California Rule. (*New York Times*, Oct. 25, 1990.) The word can now go out that off-shore banking is no longer necessary; these banks are welcome in California, where the courts will tell their defrauded customers that "Banks simply do not do business that way." This Court must grant review at least to address this most remarkable, fatuous, and downright wrong proposition, unsupported by any citation whatever to legal or factual authority, and made wholly without any opportunity for cross-examination. Latian deserves at least this much consideration

before it is not only deprived of a $10.5 million judgment, but subjected to a multi-million dollar judgment against it in favor of Banco.

IV. THE GUARANTY PAYMENT AGREEMENT WAS FOUND BY THE TRIAL COURT *NOT* TO BE FULLY INTEGRATED: THIS FINDING WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND NO BASIS EXISTED FOR ITS REVERSAL ON APPEAL

Whether a written agreement is integrated must be determined by all relevant factual evidence, including the circumstances surrounding the execution of the writing. *See, e.g., Stevenson v. Oceanic Bank,* 223 Cal. App. 3d 306, 272 Cal. Rptr. 757 (Cal. App. 1 Dist. 1990); *Mobil Oil Corp. v. Handley,* 76 Cal. App. 3d 956, 143 Cal. Rptr. 321, 324 (Cal. App. 2 Dist. 1978). Accordingly, "the trial court's ultimate conclusion on the issue of integration is entitled to the same deference on appeal as any other ruling of the court on an issue of fact." *Id.*[4]

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[4] This is also the majority rule in the United States. *See, e.g., Brennan v. Carvel Corp.,* 929 F.2d 801, 807 (1st Cir. 1991); *United States v. Clementon Sewerage Authority,* 365 F.2d 609, 614 (3d Cir. 1966); *Transamerica Oil Corp. v. Lynes, Inc.,* 723 F.2d 758, 763 (10th Cir. 1983); *Morgan v. Stokely-Van Camp, Inc.,* 34 Wash. App. 801, 663 P.2d 1384, 1389 (1983) ("[w]hether the parties intended the written contract to be the sole agreement is a question of fact."); *Alaska Northern Devel. v. Alyeska Pipeline Serv.,* 666 P.2d 33, 37 (Alaska 1983), *cert. denied,* 464 U.S. 1041 (1984) ("[w]hether a writing is integrated is a question of fact to be determined by the court in accordance with all relevant evidence.")

The Appellate Court was not free to resolve the integration issue *de novo,* but rather was bound by the trial court's determination if it was supported by substantial evidence. In resolving whether the trial court's determination was supported by "substantial evidence", the Appellate Court was required to view the evidence "in the light most favorable to the trial court's determination, drawing all reasonable inferences and disregarding all contradictory evidence. *In re Marriage of Adkins,* 137 Cal. App. 3d 68, 75, 186 Cal. Rptr. 818, 821 (Cal. App. 2 Dist. 1982); *see also, Campbell v. Southern Pacific Co.,* 22 Cal. 3d 51, 60, 583 P.2d 121, 148 Cal. Rptr. 596 (1978). In reversing the trial court's determination, the Appellate Court simply disregarded the substantial evidence in the record supporting the finding of non-integration.

The Guaranty Payment Agreement itself is rife with references demonstrating that the parties had a separate agreement granting Latian a line of credit. The Guaranty Payment Agreement expressly incorporates as an exhibit the Security Agreement of September 27, 1982, between Banco and Latian. That Agreement explicitly recites that Latian, as Debtor, is granting a security interest to Banco, as Secured Party, "as an inducement to Secured Party to extend credit to Debtor from time to time. . . . (Plaintiff Exhibit ("PX") 1.) Instead of relying on this document as evidence to support the trial-court's determination of non-integration relative to a line of credit, the Appellate Court entirely disregarded it because the Addendum to the Guaranty Payment Agreement contained a reference to Banco making line of credit facilities available to "borrowers," defined in the body of the Security Agreement as Kudsy, not Latian. Disregarding evidence supporting

the trial court's determination in favor of other "evidence" arguably contrary amounts to an impermissible "weighing" of the evidence by the Appellate Court.

Underscoring the great lengths the Appellate Court went to to disregard the evidence in support of the trial court's determination of non-integration is the fact that the Appellate Court also ignored the *admissions* of Banco's counsel on appeal that an agreement for a line of credit, given Banco's normal practices, *would be a separate agreement* from the Guaranty Payment Agreement; Banco's counsel admitted, consistent with the evidence, that any agreement for a line of credit would have been the subject of an agreement separate and distinct from the Guaranty Payment Agreement relative to the Kudsy debt. The Appellate Court simply cast this admission of Appellant's counsel aside because, *in the opinion of the Appellate Court* (and *contrary* to the evidence), banks do not make such oral agreements.

> "That a bank, . . . would make a cavalier oral commitment, such as is described in respondents' testimony, . . . is an incredible proposition.

(Order, p. 50.)

The Appellate Court clearly had the preconceived notion that a bank would not make any commitment without putting it in writing, and made that the starting point of its analysis. Of course, there is *no evidence* in the record to support the Appellate Court's generalization or the Appellate Court's assumption that banks do not make

"cavalier oral commitment[s]" to their customers.[5] Had such generalized "custom and practice" evidence been offered at trial by the bank, it no doubt would have been correctly excluded, or else subject to devastating cross-examination as to what banks actually do and have done in the real world (*e.g.*, Columbia Savings, BCCI), of which the Appellate Court was either deliberately or woefully in ignorance.

The evidence before the trial court was clearly sufficient to establish both that (1) Banco had *orally* granted the Kudsy Companies line of credit facilities separate and distinct from written payment agreements; and (2) for Banco, the line of credit agreement with Latian was not one that "would 'certainly' have been included in writing," and that it was exactly the type of agreement that "might 'naturally' have been made separately." *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 97 Cal. Rptr. 30, 34 (Cal. App. 4 Dist. 1971). The evidence before the trial court and the jury clearly established that Banco and Kudsy had entered into separate and distinct agreements

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[5] Another material fact overlooked by the Appellate Court is that Banco was making its oral commitments to Latian to induce it to assume millions of dollars of debt of one of its failing customers – Kudsy. Clearly the Bank was motivated to make such representations and commitments to Latian. *See* fn. 1, *supra*.

covering each line of credit, *at least one of which was oral,*[6] (CT 2287, Exs. 47-51, Deposition ("Depo.") of A. Ferral, p. 68.)

Banco had an established practice of *not* embodying its agreements for lines of credit in other documents such as promissory notes and guarantees. (CT 2287, Ex. 4; CT 2287, Ex. 6; CT 2287, Exs. 47-51.) There was not a single agreement embodying all of the rights and obligations of Banco and a borrower under a line of credit. There was a multiplicity of separate and distinct agreements, not all of which were in writing. Because the record contained substantial evidence supporting the trial court's conclusion that the Guaranty Payment Agreement was not integrated, its finding of that fact should have been affirmed and the parol evidence rule should not have been used by the Appellate Court to exclude any of Latian's evidence.[7]

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[6] The Appellate Court misstated this material fact when it incorrectly stated at p. 50, fn. 47, that "the record reflects that the credit line arrangements with Kudsy were *all* handled as a part of the written documentation. . . . " (emphasis herein supplied unless otherwise stated.) This was wrong, as Latian pointed out repeatedly and at length in its filings with the Appellate Court.

[7] That the parol evidence rule even became an issue on appeal further demonstrates that the Appellate Court prejudged this case and issued an Opinion that attempts to justify the result the Appellate Court wanted to reach, even though substantial evidence supported the jury's verdict. Banco had waived any argument regarding the parol evidence rule by failing to raise it in its briefs on appeal. The only mention of the parol evidence rule in Banco's opening brief is found in a footnote at page 46, where Banco attempts to incorporate all of

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V. BANCO'S ORAL PROMISES ARE NOT INCONSISTENT WITH THE WRITTEN GUARANTY PAYMENT AGREEMENT

Having resurrected the parol evidence issue and rejected the trial court's finding of fact that the Guaranty Payment Agreement was not integrated, the Appellate Court then "created" an inconsistency between the oral agreement for a line of credit and the Guaranty Payment Agreement so that the parol evidence rule could then be relied upon to exclude Latian's evidence of Banco's agreement to provide the $2 million line of credit. In so doing, the Appellate Court misstated the evidence in the record and misapplied California law.

The Appellate Court held that the oral agreement "directly contradicts the written Guaranty Agreement." (Order, p. 43.) To support this conclusion, the Appellate

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its arguments to the trial court on this issue. As Latian pointed out, this is an improper method of raising or preserving the parol evidence issue for appeal. *Balesteri v. Holler*, 87 Cal. App. 3d 717, 719-21, 151 Cal. Rptr. 229, 230-32 (Cal. App. 1 Dist. 1978); *Biljac Associates v. First Interstate Bank of Oregon*, 218 Cal. App. 3d 1410, 267 Cal Rptr. 819, 825 (Cal. App. 1 Dist. 1990); *Huntington Landmark Adult Community Ass'n v. Ross*, 213 Cal. App. 3d 1012, 261 Cal. Rptr. 875, 880 (Cal. App. 4 Dist. 1989); *Seritis v. Hotel and Restaurant Employees and Bartenders Union, Local 28*, 167 Cal. App. 3d 78, 213 Cal. Rptr. 588, 593 (Cal. App. 1 Dist. 1985), *cert. denied*, 474 U.S. 1060 (1986); *Smith v. Vallejo General Hosp.*, 170 Cal. App. 3d 450, 459, 216 Cal. Rptr. 189, 194 (Cal. App. 1 Dist. 1985).

Not to be frustrated in its result-oriented efforts, however, the Appellate Court resurrected the issue and asked the parties to brief it following oral argument.

Court reasoned that since the oral agreement for a $2 million line of credit was claimed by Latian to have been an indispensable *condition* to its obligations under the written Guaranty Payment Agreement, the oral agreement was "entirely and directly inconsistent with an express term of the integrated written agreement [that] 'Latian and Sarbaz . . . agree that such obligations are absolute and *unconditional*.' " (Order, p. 45, emphasis in original.) The Appellate Court concluded that "[i]t is simply not possible to reconcile the respondents' claim of an oral condition on which their liability to Banco depends with their expressed written commitment that there are no conditions to such liability." (*Id.*) The Appellate Court completely misapprehended the nature of the condition and misapplied California law as to the admissibility of parol evidence of a condition precedent to a written obligation to pay, unconditional on its face.

The applicable and correct rule of law is set forth in 3 Corbin on Contracts, § 589:

> A written document, unconditional on its face and fully executed, can be shown by oral testimony to have been delivered subject to a condition precedent.

Thus, in *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 97 Cal. Rptr. 30 (Cal. App. 4 Dist. 1971), the California Court of Appeals acknowledged that under California law parol "evidence is admissible to prove a condition precedent – that a contract is not to take effect until a certain condition happens. . . . " *Id.* at 35.

The Ninth Circuit faced precisely the issue "created" by the Appellate Court here, in *United States v. Hub City*

Volkswagen, Inc., 625 F.2d 213, 215 (9th Cir. 1980), and squarely held that a written contract containing an express provision that the guarantor "unconditionally guarantees" the loan *is not inconsistent* with parol evidence of an oral condition precedent that the guarantee would not become effective unless a certain event happened.[8] Similarly, in *FPI Development, Inc. v. Nakashima*, 231 Cal. App. 3d 367, 282 Cal. Rptr. 508, 525 (Cal. App. 3 Dist. 1991), the Court of Appeals observed that "there is no necessary contradiction between the statement of an obligation unconditional in form and the statement of a condition to its enforcement. . . . "

Yet again, it is clear that the Appellate Court's opinion was result-oriented, creating issues that simply do not exist to justify the result it wanted to reach. Contrary to the Appellate Court's assertion, the parol evidence rule does not exclude evidence of an oral condition precedent to the efficacy of a written promise to pay, unconditional on its face; in this case, the jury (and the trial court) found precisely such an oral condition precedent existed to the Guaranty Payment Agreement executed by Latian and Sarbaz. The parol evidence rule does not render Latian's evidence of the oral condition precedent inadmissible because the oral condition precedent is not inconsistent with the written guaranty, unconditional in form. *Coast Bank v. Holmes, supra; United States v. Hub City Volkswagon, supra; FPI Development v. Nakashima, supra.*

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[8] The Ninth Circuit noted in *Hub City* that California law and federal law were identical on this issue. Id., 625 F.2d at 214, fn. 2.

VI. THE APPELLATE COURT IMPROPERLY DISREGARDED LATIAN'S EVIDENCE SUPPORTING THE JUDGMENT

The Appellate Court (contrary to the findings of the jury and the trial court) concluded that the evidence presented by Latian at trial is not "reasonable in nature, credible, [or] of solid value." (Order, p. 16, quoting *In re Teed's Estate*, 112 Cal. App. 2d 638, 247 P.2d 54, 58 (Cal. App. 2 Dist. 1952).) In reaching this conclusion, however, the Appellate Court totally misapplied (indeed, turned on its head) the correct standard for determining sufficiency of the evidence on appeal. The standard for determining sufficiency of the evidence on appeal has been stated by the Supreme Court of California as follows:

> All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.

In re Teel's Estate, 25 Cal. 2d 520, 154 P.2d 384, 388 (1944); *see also, In re Trefren's Estate*, 86 Cal. App. 2d 139, 194 P.2d 574, 575 (Cal. App. 1 Dist. 1948).

In this case, the Appellate Court did exactly the opposite of what it was required to do in reviewing the sufficiency of the evidence. Instead of accepting "the evidence most favorable to the respondent . . . as true," and discarding unfavorable evidence "as not having sufficient verity to be accepted by the trier of fact," the Appellate Court here rejected the evidence favorable to respondent as not "reasonable in nature" and adopted the

very evidence rejected by the trier of fact. Simply stated, the Appellate Court perverted the standard of review to reach the result it desired, contrary to established California law.

The correct standard for rejection by an Appellate Court of testimony accepted by the trier of fact is set forth by the California Supreme Court in *People v. Huston*, 21 Cal. 2d 690, 693, 134 P.2d 758, 759 (1943):

> Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable testimony which merely discloses unusual circumstances does not come within that category. [Citation omitted.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, *there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.* [Citations omitted.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation omitted.]

See also, Tobola v. Wholey, 75 Cal. App. 2d 351, 170 P.2d 952, 955 (Cal. App. 3 Dist. 1946) (although testimony that is inherently improbable must be disregarded, "such action is warranted only where the testimony involves a physical impossibility or its falsity is apparent without resort to inference or deduction."); *Butticci v. Schindel Furniture Co.*, 152 Cal. App. 2d 165, 313 p.2d 62, 65 (Cal. App. 1 Dist. 1957) (" . . . the mere fact that the admitted

circumstances make the story of the witnesses seem improbable will not justify a reversal by an appellate tribunal upon the ground that the verdict is contrary to the evidence."); *Gallipo v. City of Long Beach*, 164 Cal. App. 2d 70, 330 P.2d 91, 94 (Cal. App. 2 Dist. 1958) ("[w]hen any testimony believed by the trier of the facts relates events which are not completely contrary to human experience or would seem physically possible, the judgment cannot be reversed on appeal on the ground that such testimony is inherently unbelievable.")

In this case, none of the evidence presented by Latian, either through direct testimony of the Sarbazes or the cross-examination of Stefanon, related events that are physically impossible. To state the obvious, there is simply nothing physically impossible about a bank making an oral promise of a line of credit to a customer who would be assuming significant liabilities of another bank customer in financial distress.[9] The only other legally justifiable reason for an appellate court to disregard Latian's evidence in favor of evidence rejected by the fact-finder is if such evidence were obviously false, without resort to inference or deduction. Latian's evidence was clearly not obviously false. It was only because the Appellate Court relied on its own (unsupported and

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[9] This is especially true here where the uncontroverted evidence at trial, omitted and misstated by the Appellate Court, established that Banco had previously, *orally* agreed to provide a line of credit to Kudsy.

unsupportable) postulates of banking practices,[10] that it was able to state that the testimony of the bank representatives – contrasted with that of Latian and Sarbaz – was more "consistent" with other evidence presented. (Order, pp. 12-15, fn. 12.)

Certainly, the Appellate Court could not properly reject Latian's evidence on the basis of its own unsupported and uncross-examined pronouncement that "Banks simply do not do business that way." Yet this is exactly what it did. Even while doing so, however, the Appellate Court, incredibly enough, admitted both that Latian's evidence was sufficient to support the verdict, and that the jury believed Latian's evidence:

> Based upon respondents' testimony, which the jury apparently chose to believe, Banco's affirmative claims were rejected and respondents were awarded substantial damages.

(Order, p. 51.)

Quite obviously, the Appellate Court improperly weighed the evidence on appeal, disregarded evidence that it deemed inconsistent with its own view of "common banking practices," and picked and chose from the various versions of the facts testified to by Banco's representatives, to support the conclusion that Latian's "version was neither reasonable nor credible." The Appellate Court clearly stepped over the bounds of appellate jurisprudence in disregarding evidence on appeal that was

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[10] "These circumstances are consistent with common banking practices." (Order, p. 62.) Of course, there was no evidence of "common" banking practices in the record, whatever they may be.

accepted by the factfinder, and relying on other testimony – rejected by the factfinder – to reach the result it intended to reach all along.

Straining to find support for its conclusions, contrary to those of the jury, the Appellate Court also expressed its own opinion that the conduct of the respondents was inconsistent with their testimony that the $2 million line of credit was crucial to their purchase of the Kudsy assets. The Appellate Court found that it was curious and incredible that Latian would not have requested its counsel to put such a promise in writing. (Order, p. 63.) Of course, nothing in the record compels the conclusion (contrary to the jury's verdict) that it would be "incredible" for Latian to rely on an oral promise. In fact, the only evidence relevant to this issue was the testimony of Amanollah Sarbaz, who testified that in building his business in Iran, he dealt on a verbal and hand-shake basis in arranging for and using lines of bank credit.[11] (RT 516-519, 611-12.)

The Appellate Court concluded its comments regarding the sufficiency of Latian's evidence with rhetorical questions stark in their revelation of how the Appellate

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[11] Substantial evidence may consist of the testimony of a single witness, even if that one witness is a party. *See, e.g., In re Marriage of Kahan,* 174 Cal. App. 3d 63, 68, 219 Cal. Rptr. 700, 704 (Cal. App. 6 Dist. 1985); *Muffett v. Royster,* 147 Cal. App. 3d 289, 303, 195 Cal. Rptr. 73, 81 (Cal. App. 2 Dist. 1983); *Coldwell, Banker & Co. v. Pepper Tree Office Center Associates,* 106 Cal. App. 3d 272, 277, 165 Cal. Rptr. 51, 54 (Cal. App. 4 Dist. 1980); *Clark Equipment Co. v. Wheat,* 92 Cal. App. 3d 503, 518, 154 Cal. Rptr. 874, 881 (Cal. App. 1 Dist. 1979).

Court totally pre-judged this case based on its own *a priori* views of the banking business.

> Does the self-serving claim of the respondents make any sense? Would a bank which has so meticulously documented every aspect of a transaction commit itself orally and so casually to such an important obligation? *We think not. Banks simply do not do business that way.*

(Order, p. 66.) To which any half-intelligent reader of the morning paper must reply, "Oh, really?" Again, the record is absolutely devoid of any evidence to support such generalizations on how banks do business. More fundamentally, the Appellate Court's opinions as to how banks do business are no substitute for the evidence, tested by cross-examination, as the Appellate Court's pronouncements were not, and the jury's verdict based on the evidence, and do not justify disregarding the evidence in the record favorable to Latian.

VII. THE APPELLATE COURT FAILED TO GIVE THE TRIAL COURT'S OPINION ON POSTTRIAL MOTIONS ITS REQUIRED WEIGHT

In ruling on appellants' post-trial motions, the trial court specifically found that the evidence supported the jury's findings on liability and compensatory damages, and denied appellant's motion for a new trial. A trial court's denial of a motion for a new trial must be given great weight. *See, e.g., Seffert v. Los Angeles Transit Lines,* 56 Cal. 2d 498, 364 P.2d 337, 342, 15 Cal. Rptr. 161 (1961); *Torres v. City of Los Angeles,* 58 Cal. 2d 35, 372 P.2d 906, 917, 22 Cal. Rptr. 866 (1962); *Sturges v. Charles L. Harney, Inc.,* 165 Cal. App. 2d 306, 331 P.2d 1072, 1082 (Cal. App.

1958). Instead of following this established standard of review, the Appellate Court utterly ignored and disregarded the findings of the trial court on appellant's post-trial motions.

The only justification proffered by the Appellate Court for ignoring the trial court's findings on Banco's post-trial motions was that the trial court allegedly did not have the entire trial transcript at its disposal when ruling on the post-trial motions. This so-called finding, however, even if correct, provides no legal justification for disregarding determinations of the trial court on post-trial motions. The California Code of Civil Procedure recognizes that a trial transcript will not always be available within the 60-day period allowed for post-trial motions; § 660 therefore provides that if a full transcript is not available, "the reporter must upon request of the Court or either party, attend the hearing of the motion and shall read his notes, or such parts thereof as the Court, or either party, may require." Banco subpoenaed the court reporter, who was in attendance at the hearing on Banco's motion for a new trial. At no point during the hearing, however, did Banco request the reporter to read his notes. The ability to have the reporter present to read notes when a full transcript is not available has been recognized by California courts to be an adequate substitute for a full transcript. *See, e.g., In re Marriage of Liu*, 197 Cal. App. 3d 143, 242 Cal. Rptr. 649, 654 (Cal. App. 6 Dist. 1987). Therefore, the Appellate Court could not properly use the absence of a full transcript as a justification for ignoring the trial court's findings.

VIII. CONCLUSION

Latian had a judgment of $10.5 million against Banco for fraud and breach of contract. Now it must pay Banco several million dollars, because self-appointed experts on the Appellate Court, without citing legal or factual authority or being subject to cross-examination, believe "Banks simply do not do business that way." No litigant should be the victim of such summary, Star Chamber justice. The Appellate Court clearly disregarded and failed to apply proper standards of review on appeal, substituted itself as factfinder, and misapplied California law. To assure uniformity in the standards of review applied by California appellate courts, and to correct the critical misstatements and omissions of fact committed by the Appellate Court, Latian's Petition for Review must be granted.

Dated: November 6, 1991.

Respectfully submitted,

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SUPREME COURT OF CALIFORNIA

Civil No. B 045477

BANCO DO BRASIL, S.A., Los Angeles Agency, a Banking association organized and existing under the laws of Brazil,

Plaintiff/Cross-Defendant/Appellant,

JOAO STEFANON, an individual,

Cross-Defendant/Appellant,

LATIAN, INC., a California corporation; AMANOLLAH SARBAZ, an individual; DOES 1-20, inclusive,

Defendant/Cross-Complainants/
Respondents and Cross-Appellants.

Appeal from the Court of Appeals
of the State of California
Appellate Justice Croskey
Concurrences by Justices Klein, P.J. and Danielson

RESPONDENTS' AND CROSS-APPELLANTS' REPLY IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

Pursuant to Rule 28(d) of the California Rules of Court, Respondents and Cross-appellants ("Latian") submit this memorandum in reply to the answer filed by Appellants Banco do Brasil, S.A. and Joao Stefanon (collectively referred to herein as "Banco"). Banco's answer raises several issues to which this memorandum will respond. First, Banco contends that Latian has failed to show that any prerequisite for review under Rule 29 of the California Rules of Court is present in this case. Second, Banco claims that Latian has improperly attempted to sensationalize this case and "create guilt by association by fallaciously equating Banco's denial of a line of credit with the BCCI and S & L fiascos, the third world debt crisis, and every other notorious 'scandal du jour' which they hope might strike an angry chord in their audience." (Banco's Answer, p. 5.) Third, Banco

claims that the Court of Appeals was the first court to ever base its decision upon a written record of the trial, and argues that because of that, the trial court's post-judgment rulings should not be given their ordinary weight. Finally, Banco claims that *United States v. Hub City Volkswagen, Inc.*, 625 F.2d 213 (9th Cir. 1980), fails to support Latian's argument that the oral agreement upon which Latian's claims are based is not inconsistent with the 1983 Guaranty Agreement. Each of these issues is discussed below.

Banco claims that this case is "a simple 'lender liability' action, in which a commercial borrower sought to avoid payment on a loan agreement by claiming the Bank breached an 'oral side agreement' to grant a $2 million line of credit." (Answer, p. 2.) The Court of Appeals also mischaracterized the case as one involving lender liability. (Court of Appeal Order ("Order"), p. 2.) This is *not* a lender liability case – it is an action based on common law breach of contract and fraud. Lender liability actions are based upon a heightened duty of a bank when dealing with its customers. By mischaracterizing this case as one of lender liability, Banco (and the Court of Appeals) apparently hope that this Court will view it as yet another "unremarkable" lender liability case.[1]

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[1] Banco also attempts to mislead the Court into believing that Latian's counterclaim was merely a defensive measure. The evidence of record shows, however, that Banco filed suit only to position itself as the plaintiff in this action, knowing not only that Latian had grounds to sue Banco (RT 1470-71, 1503-06), but that Latian *intended* to bring suit against Banco (RT 1569-70).

This case – before it reached the hands of the Court of Appeals – was a simple case of fraud and breach of contract, where factual disputes were decided, as provided for by both the federal and state constitutions, by a jury. The Court of Appeals' decision raises important constitutional issues. By making its premise – found nowhere in the trial record – that banks simply do not make "cavalier" oral agreements for lines of credit, the Court of Appeals denied Latian due process of law, the fundamental right of cross-examination of witnesses, and the right to trial by jury.

II. ANALYSIS

A. THIS CASE INVOLVES IMPORTANT QUESTIONS OF LAW UNDER WHICH UNIFORMITY OF DECISION IS ESSENTIAL.

In reversing both the jury's verdict and the rulings of the trial court on post-trial motions, the Appellate Court usurped the roles of expert witness and the jury. By reversing the trial court's determination that the 1983 Guaranty Agreement was not integrated, the Court of Appeals applied an incorrect *de novo* standard, failing to give proper deference to the trial court's factual determination.[2] Furthermore, by rejecting the myriad of evidence presented at trial by Latian and *making up its own evidence,* the Court of Appeals flagrantly usurped both the witnesses' and the jury's functions.

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[2] Banco claims that the trial court based its decision that the 1983 Guaranty Agreement was not integrated on only one piece of evidence. Contrary to this assertion, however, Judge

(Continued on following page)

As Justice Carter commented in *Doran v. City and County of San Francisco*, 283 P.2d 1, 18 (1955) (Carter, J. dissenting):

> Unless we wish to repeal the portions of the Constitution of the United States and the Constitution of the State of California which guarantee the right to trial by jury, the result of this case must not be allowed to stand.

Further comments by Justice Carter are particularly applicable here:

> I would commend to the majority of this court a reading of the history of the development of the jury system, e.g., James B. Thayer, *The Jury and Its Development*, 5 Harvard Law Review 249 (1892). A cursory examination of that history will show that from its first establishment as a part of our system of law, the jury has had the function of determining facts. . . . Do [my colleagues on this bench] seek a return to the feudal system or some other pre-twelfth century form of judicial administration?
>
> * * *
>
> I believe in Constitutional government. I believe in obeying Constitutional mandates. I believe the people of this state have the right to expect

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(Continued from previous page)

Mills had before him more evidence than that, including the past practices of Banco to *not* put all loan agreements in writing, and the Security Agreement (Part of the 1983 Guaranty Agreement), which specifically recites that Latian is granting a security interest to Banco "as an inducement to Secured Party [Banco] to extend credit to Debtor [Latian] from time to time. . . . " (Plaintiff Exhibit 1.)

> of the Justices of this Court that they will obey their oath of office and support the Constitution of the United States and the Constitution of California, and I believe that when the Justices of this Court decide that a party is not entitled to have a jury decide issues of fact in a case in which such party is entitled to a jury trial as a matter of right, they are not supporting the Constitution and are violating their oath of office.
>
> If a majority of this Court can deny a litigant the right to a jury trial in one case, it can do it in a hundred cases, or it can do it in every case.

Id., at 18-19.

In reaching its decision in this case, the Court of Appeals denied Latian's rights to due process and a jury trial. Latian submits that this Supreme Court will find no similar case left standing by the highest court of any state, and that the decision in this case by the California Court of Appeals is an aberration. "Uniformity of decision" is crucial where a civil litigant's right to a jury trial is at issue. This case meets the standards for review set forth in Rule 29(a) of the California Rules of Court.

Contrary to Banco's assertions, the Court of Appeals did not apply the correct legal standard when it rejected all of Latian's evidence in support of the verdict. The Court found that the evidence was not "solid, credible or reasonable," but did not follow the strict standard set forth by the Supreme Court of California in coming to that conclusion. (Order, p. 66.) That standard is set forth in *People v. Thornton*, 11 Ca1.3d 738, 754, 114 Cal. Rptr. 467, 523 P.2d 267 (1974):

> Although an Appellate Court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [CITATION] To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [CITATIONS] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [CITATION]

Applying these principles, the decision by the Court of Appeals cannot stand. In determining that Latian's evidence was insubstantial and unreasonable, the Court resorted to unsupported premises, such as that Latian's claim that Banco orally promised a line of credit "requires one to believe that a bank officer, without receiving any information as to the borrower's financial condition or history, would (or could) commit his bank to an open-ended multi-million dollar obligation without discussion . . . " (Order, p. 62); that Latian's "contemporaneous conduct" was "inconsistent" with their claim that the $2 million line of credit was essential to their purchase of the business because no reference to a "$2 million line of credit" was made in any of the offers for the company (Order, p. 63); and that Latian's failure to provide financial information to Banco was "inexplicable" if it really was the case that the line of credit was "critical" to their

decision to go forward with the purchase of the companies. (Order. p. 64.) None of these examples provided by the Court, however, shows that Latian's evidence involved a "physical impossibility," or a falsity without resort to inferences or deductions. The Court's conclusion that Latian's evidence was unreasonable was based upon the Court's preconceived notions about what would be reasonable conduct in this situation. Such unsupported musings by an Appellate Court should not be allowed, and cannot be allowed under a system of justice where facts are determined by juries, not judges.

B. LATIAN HAS NOT SENSATIONALIZED THIS CASE.

Banco accuses Latian of making "sensationalist, *ad hominem* attacks upon the Appellate Court" in an attempt to "shock this Court." The only example provided by Banco of Latian's alleged *ad hominem* attacks on the Appellate Court is Latian's statement that the decision by the Appellate Court "was patently result-oriented, . . . " (Banco's Answer p. 5, n.4.) Latian stands by this depiction of the Court of Appeals' decision, and submits that upon even a cursory review of the opinion, one can come to no other conclusion. When an appellate court resorts to unsupported statements such as "banks simply do not do business that way" and "that a bank . . . would make a cavalier oral commitment . . . to provide further open-ended credit is an incredible proposition" to support its reversal of a jury verdict, this Court must stand up and take notice. (Order, pp. 50, 66.)

Banco also accuses Latian of trying to create "guilt by association" in bringing up the bank scandals of the past few years. Latian's purpose in pointing out these incidents, however, was not to create guilt by association, but rather to point out that the Court made unsupported statements (without being subject to cross-examination) about what it viewed to be normal banking practices.[3] It is *not* a valid starting point for the Court of Appeals to assume that banks do not make oral promises to their customers.

C. THE TRIAL COURT'S RULINGS DESERVE DEFERENCE.

Banco claims that the Court of Appeals was the only court to have "the benefit of a written record" when making its rulings.[4] (Banco's Answer, p. 1, n.1.) This

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[3] Banco applauds the Court's unsupported statements as "simply a common sense observation based on practices in the real world. . . . " This is precisely what Latian was attempting to rebut by pointing out BCCI and the S&L scandals. Had any expert witness expressed such a view at trial, that expert would have been subjected to devastating cross-examination on the recent bank scandals.

The real world in general is not as the Court of Appeals depicted it, which makes the Court's blanket absolution of banks in general particularly offensive. This case cannot be dealt with by relying on unsupported, generalized statements. It must be decided on its *own* facts, which it properly was by the jury, and affirmed in strong language by the trial court.

[4] Contrary to Banco's assertion, much of the trial had been transcribed by the time of the post-trial motions, and was in front of Judge Lavine when he considered and made his rulings on the post-trial motions. (*See* CT 5156, 5161.)

raises an important issue of what amount of deference is owed lower court decisions when they are based on anything but a complete trial transcript.

Contrary to the Court of Appeals intimations, the fact that a full transcript was absent at the time Judge Lavine made his post-trial rulings provides no legal justification for ignoring the trial court's findings. The California Code of Civil Procedure § 660 provides the mechanism for protecting a party's rights in such a situation. Banco followed that procedure and subpoenaed the court reporter to be in attendance at the hearing on Banco's motion for a new trial. At no point during the hearing did Banco request the reporter to read his notes. Banco cannot now claim that Latian overstated, misstated, or mischaracterized the facts at the time of the post-trial motions.

After review of (1) the trial transcripts lodged with the Court by Banco (RT 5156, 5161), (2) the extensive briefs filed by both parties, and (3) oral arguments extending over at least three different days, Judge Lavine made the following factual findings:

> The Court finds this is a situation in which Stefanon had a strategy to defraud the Sarbaz family as early as 1982 and fully informed his superior of the strategy; the course of conduct of the bank was a deliberate attempt to take advantage of the Sarbaz family; the bank made its representations to Latian repeatedly on every occasion Latian signed a document. After Latian delivered his check for $310,000 to be held in trust until the line of credit was approved, the bank broke its promise by appropriating the $310,000; the bank knew of the culpability

> throughout the events, as evidenced by Stefanon's contract, written reports, and the top officials, aside from Stefanon, tried to cover up.

Minute Order, September 29, 1989, CT 5360-63.

D. THE COURT OF APPEALS ERRED IN NOT FOLLOWING THE HOLDING OF HUB CITY.

Banco contends that *Hub City,* which dealt precisely with the issue created by the Appellate Court, is merely a "*federal case* which is factually distinguishable from the above California authority and does not conflict with it." (Banco's Answer, p. 23.) Of course, Banco does not explain how *Hub City,* 625 F.2d 213 (9th Cir. 1980) can be factually distinguished – for the very good reason that it is factually *indistinguishable.* The Ninth Circuit noted in *Hub City* that under both California and federal law, no contradiction exists between an obligation being unconditional, yet there being a condition precedent to the enforcement of the obligation. 625 F.2d at 214, n.2. In *Hub City,* the relevant document was a guarantee that *expressly* provided that the guarantor "unconditionally" guaranteed the loan. The Ninth Circuit held that the parol evidence rule did not apply to exclude testimony of an orally agreed-to condition precedent that the guarantee would not become effective until signed by all of Hub City's shareholders. The Ninth Circuit explained:

> Neither of these two clauses [that provided that the guarantors "unconditionally" guaranteed the loan] had any force until the guarantee became effective. If the guarantors are able to establish at trial that they did in fact have the

> alleged agreement with bank officials, then neither of these two clauses ever became effective, and neither is inconsistent with the oral condition precedent. [Citations omitted.] If each guarantee had contained a clause stating that it would be binding regardless of whether the bank obtained similar guarantees from other individuals, the evidence of the oral agreement would have been properly excluded under the parol evidence rule. The guarantees in this case contained no such provision.

625 F.2d at 215.

Analogously, in this case, if the 1983 Guaranty Agreement had contained a clause stating that it would be binding regardless of whether Banco do Brasil provided a $2 million line of credit to Latian, then evidence of the oral agreement might have been properly excluded under the parol evidence rule. The Guaranty Agreement, however, contained no such provision. Accordingly, the fact that the 1983 Guaranty Agreement provided for an unconditional obligation on the part of Latian provides no inconsistency to Latian's claim that the agreement did not become effective until the condition precedent was satisfied, that being the provision of a $2 million line of credit.

The very argument rejected by the Ninth Circuit in *Hub City* was the Court of Appeals' *only* argument in support of its finding that the parol evidence rule should have excluded all evidence of the oral promise made by Banco. In so holding, the Court of Appeals misconstrued California law. For this reason, review by this Court is warranted to preserve uniformly of decision on this important issue of law.

III. CONCLUSION

The Appellate Court did not apply proper standards of review on appeal in this case. It not only disregarded the trial court's factual findings, but it flagrantly substituted itself for both expert witness without cross-examination and the jury when it determined that the evidence presented by Latian was unreasonable. The issues created by the Court of Appeals' decision in this case cry out for review by this Court. Latian respectfully submits that its petition for review must be granted.

Dated: December 6, 1991

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